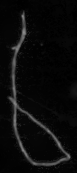

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CASES.

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 74

Arver v. United States, 245 U.S. 366 21

Baker v. Carr, 369 U.S. 186 62

Bas v. Tingy, 4 Dall. 37 74

Cook v. United States, 288 U.S. 102 93

Endo, Ex parte, 323 U.S. 283 72

Erie Railroad Co. v. Tompkins, 304 U.S. 64 21

Estep v. United States, 327 U.S. 114 95

Everson v. Board of Education of the Township of Ewing, 330 U.S. 1 105, 111

Flast v. Cohen, 392 U.S. 83 64

Griswold v. Connecticut, 381 U.S. 479 102

Hamilton v. Kentucky Distilleries Co., 251 U.S. 146 62

Holmes v. United States, 391 U.S. 936 22
Home Building & Loan Association v. Blaisdell, 290 U.S. 398 24
Jenison, In re, 375 U.S. 14, on remand, 267 Minn. 136, 125 N.W. 2d 588 117
Kepner v. United States, 195 U.S. 100 17
Little v. Barrene, 2 Cranch, 170 75
Luther v. Borden, 7 How. 1 60
McGowan v. Maryland, 366 U.S. 420 101
Milligan, Ex parte, 4 Wall. 2 61
Mora v. McNamara, 389 U.S. 934 22
Panama Refining Co. v. Ryan, 293 U.S. 388 74
Powell v. McCormack, 387 U.S. 933 62
Quirin, Ex parte, 317 U.S. 1, 27 93
Reid v. Covert, 354 U.S. 1 62
Sherbert v. Verner, 374 U.S. 398 117
Sicurella v. United States, 348 U.S. 385 108
Talbot v. Seeman, 1 Cranch, 1 74
Terminiello v. Chicago, 337 U.S. 1 21
Torcaso v. Watkins, 367 U.S. 488 111, 113
United States v. Bowen, Cr. No. 42499 102, 103
United States v. Bramblett, 348 U.S. 503 15
United States v. Curtiss-Wright Export Corp., 299 U.S. 304 2, 20
United States v. Grainger, 346 U.S. 235 20
United States v. Green, 350 U.S. 415 2, 15
United States v. Halseth, 342 U.S. 277 16
United States v. Hastings, 296 U.S. 188 15
United States v. International Union United Auto-

mobile, Aircraft & Agricultural Employment Workers of America, 352 U.S. 567 20
United States v. Kahriger, 345 U.S. 22 20
United States v. Macdonald, 207 U.S. 120 17
United States v. Mersky, 361 U.S. 431 18
United States v. O'Brien, 391 U.S. 367 21
United States v. Pink, 315 U.S. 203 93
United States v. Robel, 389 U.S. 258 61
United States v. Seeger, 380 U.S. 163 106 et seq.
United States v. Sisson, 294 F. Supp. 511 1
United States v. Sisson, 297 F. Supp. 902 1
United States v. Spector, 343 U.S. 169 20, 95
United States v. Wayne Pump Co., 317 U.S. 200 16
United States v. Zisblatt, 172 F. 2d 740 17
Welsh v. United States, No. 76, 1969 Term 103
Yamashita, In re, 327 U.S. 1 93
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 61, 66

STATUTES, ETC.

U.S. Constitution, Article I, Section 8 2 et seq.
U.S. Constitution, Article II, Section 2 3
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U.S. Constitution, Amendment I 3 et seq.
U.S. Constitution, Amendment II 4
U.S. Constitution, Amendment III 4
U.S. Constitution, Amendment V 4 et seq.
U.S. Constitution, Amendment IX 4 et seq.
U.S. Constitution, Amendment X 4

Criminal Appeals Act, 18 U.S.C. 3731 2 et seq.
Military Selective Service Act of 1967, 50 U.S.C. App. 451 et seq. 2 et seq.
Selective Service Act of 1948 48, 59
Universal Military Training and Service Act (1951) 48
1 Stat. 252 29
1 Stat. 253, Act of May 8, 1792 29
1 Stat. 389, Act of February 28, 1795 29
3 Stat. 147 28
34 Stat. 1246 (1907) 16

MISCELLANEOUS.

Adams, Life and Writings of John Adams, Vol. 9, Boston 44
American State Papers, Military Affairs, I 25 et seq.
Annals of Congress, vol. 28, p. 93 30 et seq.
Articles of Confederation 43
Bailyn, Ideological Origins of the American Revolution 46
Black, the Selective Draft Cases—A Judicial Milepost on the Road to Absolutism, 11 Boston U. L. Rev. 37 23
Charter of the International Military Tribunal of Nuremberg, 59 Stat. 154-4 affirmed by unanimous resolution of the General Assembly of the United Nations, G. A. Res. 95 (I) 93
Charter of United Nations, 59 Stat. 1031 78 et seq.
Clark, Guidelines for the Free Exercise Clause, 83 Harv. L. Rev. 347 109

Conscientious Objector, The, 21 Columbia University Quarterly, No. 4, October 1919, pp. 268-269 102

Duffet (Ed.) Against the Crime of Silence: Proceedings of the Russell International War Crimes Tribunal 92

Falk, Ed., The Vietnam War and International Law 75

Farrand, The Records of the Federal Convention of 1787 98

Federalist, The 40 et seq.

Final Declaration of the Geneva Conference on the Problem of Restoring Peace in Indo-China, 161 Brit. & For. State Papers 359 82

Finn, E.D. A Conflict of Loyalties: The Case for Selective Conscientious Objection 109

"Forced Transfer" of entire villages, pp. 305-341 86

Freeman, the Constitutionality of Peacetime Conscription, 31 Va. L. Rev. 40 23

Fried, Rapporteur, Vietnam and International Law 75

Friedman, Conscription and the Constitution, 67 Mich. L. Rev. 1493 23

Fulbright, The Vietnam Hearings 80 et seq.

Goulden, Truth is the First Casualty 64

Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectics, 66 Harv. L. Rev. 1362, 1382 96

Hart & Wechsler, The Federal Courts and the Federal System, pp. 1365-1366 20

Hearings of Senate Committee on Armed Services 48 et seq.

Higgins, The Development of International Law through the Political Organs of the United Nations, 217 81

Hunt & Scott, The Debates and the Federal Convention of 1787 Which Framed the Constitution of the United States of America 100

In the Name of America, Clergy and Laymen Concerned About Vietnam, 1968 85

Jacobson, Ed., The English Libertarian Heritage 46

Jessup, A Modern Law of Nations, 163-164 81

Judgment of the International Military Tribunal for the Far East 93

Kelsen, Law of the United Nations, 798-800 81

Kreidberg & Henry, History of Military Mobilization in the United States Army (1775-1945), Department of the Army Pamphlet no. 20-212, June 1955 25 et seq.

Lawyers Brief Printed at the request of Senator Wheeler, 86 Cong. Rec. 5206-5210 23

Legal Aspects of Selective Service, Gov. Print. Off. pp. 13-14 112

Lemkin, "Genocide as a Crime under International Law," 41 American Journal of International Law 145 84

Luce & Sommer, Viet Nam, The Unheard Voices pp. 174-176, 266-268 92

Mahon "Military Service," 15 Encyclopaedia Britannica 453 45

Mansfield, The Vietnam Conflict: The Substance and the Shadow 81

New York Herald Tribune, Beverly Deepe, Saigon, April 25, 1965 89

New York Herald Tribune, May 23, 1965 "Scorched Earth," pp. 143-152 91

New York Post, November 13, 1967 "Defoliation and Crop Destruction," pp. 283-304 85

New York Times, Sept. 16, 1965 "Destroying Huts and Villages," pp. 131-152 90

New York Times, September 30, 1965 "Prisoners of War and the Wounded in the Field" 88

New York Times, section 4, November 7, 1965 "Aerial Bombardment in South Vietnam," pp. 173-268 91

New York Times, January 4, 1966 "Use of Gas," pp. 117-230 90

New York Times, May 7, 1966 "Civilians, Suspects and Combatants," pp. 91-116 90

New York Times, Sept. 5, 1966 "Refugees," pp. 343-367 87

New York Times, January 11, 1967, BENSUC, South Vietnam, January 8 86

New York Times, February 21, 1967 "Weapons" 92

New York Times, March 3, 1967 90

New York Times, May 8, 1967 "Civilian War Victims," pp. 369-384 88

New York Times, October 28, 1967 87

Note, Congress, the President, and the Power to Commit Forces to Combat, 81 Harv. L. Rev. 1771 65

Note, 83 Harv. L. Rev. 453 23, 63

Office of U.S. Chief of Counsel for Prosecution of Axis Criminality, Nazi Conspiracy and Aggression, Opinion and Judgment 93

Packer, Mens Rea and the Supreme Court: Article 6(a) and Article 8 of the Treaty of London, August 8, 1945, 59 Stat. 1544 96

Patterson, "The Forgotten Ninth Amendment" 98

Potter, Conscientious Objection to Particular Wars, 1968 Religion and the Public Order 44 109

Preparedness Investigating Subcommittee of the Senate Armed Services Committee, Worldwide Military Commitments, Part I, Hearings, August 1966, p. 68 77

Pusey, The Way We Go to War (1969) 64

Report of the National Advisory Commission on Selective Service 54

SEATO Treaty, The, 6 U.S. Treaties 81, TIAS No. 3170 76 et seq.

SEATO Treaty, the Geneva Accords of 1954, Articles 51 and 33(1) of the United Nations Charter 12

Schell, The Village of Ben Sue 92

Selective Service Act, The, Special Monograph No. 2, Vol. III, pp. 157-163, U.S. Gov. Print. Off. 1954 32

Senate Foreign Relations Committee, Calendar No. 118 Report No. 91-120, National Commitments 65 et seq.

Senate Foreign Relations Committee, August 16, 17, 21, 23 and September 19, 1967, on S. Res. 151, U.S. Commitments to Foreign Powers 65 et seq.

Stern & Gressman, Supreme Court Practice, p. 41 20

Taney, Thoughts on the Conscription Law of the United States—Rough Draft Requiring Revision, 18 Tyler's Historical & Genealogical Magazine, 74 23

Tax, The Draft, (U. of Chicago, 1967) 50

Trenchard, History of Standing Armies 46

United Nations General Assembly Resolution 260(III) 84

U.S. Bureau of the Census Statistical Abstract of the United States (1969) 22 et seq.

U.S. Dept. of the Army, The Law of Land Warfare (Field Manual No. 27-10, 1963) 93

U.S. Dept. of the Army, Trials of War Criminals Before the Nuremberg Military Tribunals under the Control Council Law No. 10 93

Velvel, The War in Vietnam: Unconstitutional, Justiciable, and Jurisdictionally Attackable, 16 Kan. L. Rev. 449 64

Voluntarism to Coercion, Yale Review, vol. LVII, No. 4 60

Weigley, History of the United States Army, 1967 26 et seq.

Who Serves When Not All Serve, Report of the National Advisory Commission on Selective Service (Gov. Print. Off. 1967) 53

Wormuth, The Vietnam War: The President versus the Constitution 64, 76

Wright, Federal Practice and Procedure, vol. 1, p. 399 n. 24 16

Wright, Handbook of the Law of Federal Courts, p. 413, n. 30 20

Supreme Court of the United States.

OCTOBER TERM, 1969.

No. 305.

UNITED STATES OF AMERICA,
Appellant,
v.
JOHN HEFFRON SISSON, JR.,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE APPELLEE.

Opinions Below.

The opinion of the United States District Court for the District of Massachusetts granting the appellee's motion in arrest of judgment (A. 248-264) is reported at 297 F. Supp. 902. Three prior opinions of the district court rejecting other claims that the Act is invalid (A. 80-102) are reported at 294 F. Supp. 511, 515, 520.

Jurisdiction.

On April 1, 1969, the district court entered an order granting the appellee's motion in arrest of judgment on

the ground that the statute upon which the indictment herein is founded, the Military Selective Service Act of 1967, 50 U.S.C. App. 451 *et seq.* (hereinafter sometimes referred to as the "Act" is invalid). The appellee is charged with having refused to obey an order, which was issued to him under authority of the Act, that he submit to induction into the armed forces of the United States. Such refusal is, by the Act, made a crime punishable by a penalty of up to five years imprisonment and $10,000 fine. A notice of appeal to this Court was filed on April 23, 1969. On October 13, 1969, this Court entered an order, postponing further consideration of the question of jurisdiction to the hearing on the merits (A. 268).

18 U.S.C. 3731 confers jurisdiction upon this Court to review the decision of the district court on direct appeal. *United States* v. *Green,* 350 U.S. 415. The jurisdiction of this Court extends to grounds rejected by the district court which challenge the validity of the Act. *United States* v. *Curtiss-Wright Export Corp.,* 299 U.S. 304, 329-330. See the discussion below, pp. 15-21.

Constitutional Provisions.

Article I, Section 8, of the Constitution of the United States provides in pertinent part:

> The Congress shall have Power . . .
>
> . . . . . .
>
> To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
>
> To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
>
> To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

. . . . . .

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article II, Section 2, of the Constitution of the United States provides in pertinent part:

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; . . .

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .

Amendment I to the Constitution of the United States provides in pertinent part:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .

Amendment II to the Constitution of the United States provides:

> A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

Amendment III to the Constitution of the United States provides:

> No Soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Amendment V to the Constitution of the United States provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger . . . nor be deprived of life, liberty, or property, without due process of law . . .

Amendment IX to the Constitution of the United States provides:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X to the Constitution of the United States provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Statute Involved.

Section 4(a) of the Act, 50 U.S.C. App. 454(a), provides in pertinent part:

> The President is authorized, from time to time, whether or not a state of war exists, to select and induct into the Armed Forces of the United States . . . such number of persons as may be required to provide and maintain the strength of the Armed Forces.

Section 6(j) of the Act, 50 U.S.C. App. 456(j), provides in pertinent part:

> Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term "religious training and belief" does not include essentially political, sociological, or philosophical views, or a merely personal moral code. . . .

Section 12(a) of the Act, 50 U.S.C. App. 462(a), provides in pertinent part:

> Any . . . person . . . who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title

. . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both . . .

Questions Presented.

1. Whether this Court has jurisdiction of the direct appeal from the decision granting a motion in arrest of judgment based on the invalidity of the statute upon which the indictment is founded.

2. Whether the power of Congress to raise and support armies is limited so as to not include the power to conscript in times of peace.

3. Whether the power of Congress to conscript is limited to occasions when sufficient military manpower cannot be procured through less burdensome means.

4. Whether the power of Congress to raise and support armies is limited so as to not include the power to conscript for an illegal war.

5. Whether, if the legality of the Vietnam war is held to be a political question, the district court is without jurisdiction of the offense charged against the appellee.

6. Whether the power of Congress to raise and support armies through conscription is limited by the religion clauses of the First Amendment and the due process clause of the Fifth Amendment so as to not include the power to conscript one who objects to the Vietnam war on grounds of conscience.

Statement.

On September 27, 1968, the grand jury returned an indictment charging that Sisson wilfully had refused to sub-

mit to induction into the armed forces of the United States, as ordered by his local draft board "under and in the execution of the Military Selective Service Act of 1967. . . ."

Prior to trial, Sisson moved to dismiss the indictment on the grounds that, first, the Constitution does not empower Congress to conscript in time of peace (A. 34-40); second, the Constitution does not empower Congress to conscript if a less burdensome alternative is available (A. 40-42); third, the Constitution does not empower Congress to conscript manpower for an illegal war (A. 16-21; 56-72); and fourth, the Constitution does not empower Congress to compel military service of an individual against the dictates of that individual's conscience (A. 31-33; 71). Sisson further proposed, as a complete defense, that he reasonably believed the Vietnam war to be illegal, and that his reasonable belief negatived the existence of specific intent —which, he asserted, is an element of the offense (A. 2; 43).

The district court rejected the first three arguments on the ground that, while Sisson had the requisite standing (A. 80-82), these arguments on the constitutional limits of the power of Congress to conscript depend on the resolution of issues which are essentially political in nature and, therefore, not appropriate for judicial determination (A. 80-102). The district court also reserved decision on Sisson's claim that his refusal to submit to induction was an act of conscience protected by the Constitution (A. 93) and rejected the argument that specific intent is an element of the offense defined by the Act (A. 92-93; 180; 195; 238-239).

After trial, Sisson moved that the district court arrest judgment for insufficiency of the indictment on the grounds urged prior to trial (A. 265) and, inasmuch as the district court, by its rulings of substantive law rejecting those grounds had foreclosed his opportunity to present the substance of his defense, Sisson now urged that the district

court lacked jurisdiction of the offense charged in the indictment (A. 244-245).

On April 1, 1969, the district court arrested the judgment of conviction for insufficiency of the indictment, explicitly basing its decision on the invalidity of the statute upon which the indictment is founded (A. 263). As predicate for its conclusion that as applied to Sisson the Act is unconstitutional, the district court made the following undisputed findings of fact: "Sisson does not now and never did claim that he is or was in the narrow statutory sense a religious conscientious objector . . . But Sisson's table of ultimate values is moral and ethical . . . he was as genuinely and profoundly governed by his conscience as would have been a martyr obedient to an orthodox religion. Sisson's views [that the Vietnam war is illegal] are not only sincere, but, without necessarily being right, are reasonable" (A. 250-252).

The district court held that the free exercise of religion clause of the First Amendment and the due process clause of the Fifth Amendment prohibit the application of the Act to Sisson to require him to render combat service in Vietnam. In essence, the court held that under present circumstances the power to conscript Sisson for active duty in Vietnam is not necessary and proper: the court based its conclusion on the magnitude of Sisson's interest in not killing in the Vietnam conflict as against the want of magnitude in the country's present need for him to be so employed (A. 258, 261). The court further held, alternatively, that in granting a deferment to religious pacifists but not to Sisson, the Act violates the provision of the First Amendment that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" (A. 263).

Summary of Argument.

I.

The appellee agrees with the conclusion of the government that the case is appealable to this Court under the "motion in arrest" language of the Criminal Appeals Act, 18 U.S.C. 3731, but believes that jurisdiction may also be sustained under the "decision . . . dismissing" or "motion in bar" clauses thereof.

II.

On the merits, appellee essentially makes one argument —Congress has no power to conscript him now—but he presents several variations on that one theme.

It is important at the outset to emphasize what appellee does not challenge here: he is willing to assume, for purposes of his argument, that Congress has the power to conscript in case of complete mobilization for a declared war such as the First or Second World War. Indeed, he is also willing to assume for present purposes that in a vital emergency, such as the Civil War, resort to conscription is likewise justified. In short, appellee does not maintain that Congress is without power to conscript under any and all circumstances.

Instead, the proposition he tenders is that the power to conscript is a limited one and that Congress has transgressed the constitutional limits in the Military Selective Service Act of 1967.

The first limit is that Congress has no power to compel military service in an undeclared war overseas. The historical record permits little doubt that Congress has no power to conscript under normal circumstances. Rather, it appears that the power to conscript in extraordinary emergencies such as the Civil War or the two World Wars,

the power to conscript "in the last extremity," can be inferred as one of the powers delegated to Congress—despite the historical record, but only because the power is essential to survival of the nation. Stated differently, the Constitution does not in terms deny the existence of that limited power, and in the absence of such an express prohibition the historical record cannot be persuasive that a power indispensable to self-preservation was withheld. On the other hand, this is as much as the historical record will allow. The first conscription bill proposed in this country, after war had been declared against Great Britain, after the Capitol had been burned, not only was not adopted but never reached the floor of either house of Congress. Indeed, even a militia law colorably authorized by the constitutional provision for cases of invasion did not pass. The history surrounding this 1814 measure, as well as the writings of the Federalists, provide a historical context for interpretation of the Constitution which permits no reasonable doubt that the power to conscript in times of peace was not delegated to Congress. The scope of any inferred delegated power to conscript is strictly limited to great emergencies and measured by the necessity of the power to cope with such emergencies. The power does not reach an undeclared war across the Pacific Ocean.

Assuming, contrary to the foregoing, that Congress may in some instances have the power to conscript for an undeclared foreign war, the limits of the power extend only to what is "necessary and proper." The Military Selective Service Act of 1967 is neither necessary nor proper for several reasons: in the first place, authoritative evidence indicates that a volunteer army has been, for several years, a viable alternative to the system of conscription. Volunteer manpower is available provided that adequate financial incentives are given. The cost of an all-volunteer force would be approximately 5% of the

present defense budget and could easily be absorbed within the present budget by reordering priorities: whatever the merits of the space exploration program, for example, Congress cannot appropriate funds for such a program and in the same breath claim that it cannot afford the cost of not resorting to compulsory military service. The matter would stand on a different footing if manpower were not available at any price or were available only at a price so extravagant as to make the volunteer plan impractical. Given existing circumstances, the power to conscript is not necessary and, therefore, does not exist.

Moreover, the Act is also not proper because of its arbitrary, selective nature. This point is related to the point that a volunteer army is a practical alternative and that the Act, therefore, imposes an unconstitutional tax on the few who are selected. Beyond that point of obvious injustice, however, the Act is also defective because of the arbitrary way in which it defines the manpower pool, for instance by excluding women, and because of the arbitrary way in which it reduces available manpower through deferments which "channel" registrants into specified civilian occupations. Assuming that Congress has the power to conscript for military service, it hardly follows that Congress has the power to conscript for civilian service as well. Pursued to its ultimate logic, the power to conscript combined with the power to "channel," which the Act asserts, is tantamount to an authorization of the existence of involuntary servitude.

Secondly, the Act is not proper because it delegates to the President the war powers vested in Congress by the Constitution. The Act purports to authorize the President to conscript men ". . . whether or not a state of war exists . . ." and irrespective of the use to be made of such conscripts. The Act in fact has been applied to draft men for active duty in Vietnam. Assuming that Congress, by

appropriate exercise of its constitutional power might have sanctioned this practice, Congress could not do so by abdicating its constitutional responsibility and delegating its power to the President—which is precisely what Congress has done. The Tonkin Bay resolution, if viewed as authority for the President's use of the armed forces in Vietnam, represents an attempt at unlimited delegation of war powers which can only be exercised by Congress. Furthermore, even if Congress were thought to have "participated" sufficiently in the Vietnam venture to sanction the President's use of troops there, it would not follow that such participation is constitutionally sufficient for the purpose of raising such troops through conscription: the power to raise and support armies is distinct from the power to declare war, and Congress has often authorized a "limited" undeclared war without at the same time authorizing conscription therefor. Assuming that the Vietnam war has the blessings of Congress, still Congress may not hand over to the President the power to conscript without at least making a congressional judgment of the "necessity" without which the power itself does not exist.

Thirdly, the Act is not proper because, as applied, it purports to authorize conscription for an illegal war. The war is illegal not only because it is a presidential war, unauthorized by Congress unless such authorization is sought to be derived from an unconstitutional delegation of power from Congress to the President, but also because it violates various treaties, international agreements and rules of international law, notably the provisions of the SEATO Treaty, the Geneva Accords of 1954, Articles 51 and 33(1) of the United Nations Charter, and the rules and customs of warfare. Manifestly, the Constitution delegates no power whatsoever, express or implied, to conscript men for a war which by hypothesis is illegal. It follows that the Act is invalid if applied in pursuit of a war which vio-

lates either domestic or international law. The appellee cannot be deprived of this defense by holding the question of legality to be a political question without at the same time depriving the district court, as a court created under Article III of the Constitution, of jurisdiction over the offense—unless, of course, the appellee's reasonable belief that the war is illegal is a complete defense, since that defense would make irrelevant the question whether the war is in fact illegal. As for the appellee's standing to raise the question of legality, his standing is based not so much on the probability or possibility that he will himself be ordered to fight in Vietnam as on the causal relationship between the Vietnam war and his being ordered to report for induction: but for the Vietnam war, he would not have been drafted.

Finally, assuming that Congress has the power to compel military service in an undeclared foreign war, and assuming that the Act is in general a necessary and proper exercise of that power, the Act nonetheless cannot be applied to the appellee because the power is limited by the religion clauses of the First Amendment (alternatively by the protection of conscience afforded by the Ninth Amendment), as well as by the due process clause of the Fifth Amendment. The government denounces the balancing approach utilized by the district court. But that approach essentially starts from the incontrovertible fact that conscription of a religious pacifist is an abridgement of his right to free exercise of religion, while conscription of one who does not oppose war involves no interference with his free exercise of religion. From that premise, or its equivalent, the district court reasoned that the power to conscript the latter man might be necessary and proper under circumstances when the power would not be necessary and proper with respect to the religious pacifist. This constitutional principle of selectivity, far from being new, has

its statutory counterpart in the Act which authorizes conscription of some and deferment or exemption of others precisely on the basis of necessity. The government is surely wrong in asserting that the First, Fifth and Ninth Amendments establish no constitutional priorities, that Congress has an unfettered discretion in judging necessity (apart from the question of invidious discriminations). The Constitution does grant special protection to freedom of conscience and, if conscientious objectors are nonetheless subject to the draft, this is true only "in the last extremity."

Moreover, the Act violates the First Amendment prohibition against an establishment of religion. The government seeks to characterize all so-called "selective" objectors as political objectors and to deny that a selective objector may nevertheless be a religious objector (A. 47). If its position is incorrect, which it patently is, then the government is also incorrect in asserting that Congress may distinguish between religious pacifists and religious selective objectors by granting to the former an exemption from military service while denying it to the latter. Indeed, it is perfectly clear that the Act tends toward an "establishment" of pacifist religions by discouraging religions which endorse the principle of selective objection. And the appellee is just as injured as the "religious" selective objector, for he is not—as the government asserts of all selective objectors—a "political" objector, or an objector whose views are essentially sociological views. It is not disputed that the appellee is a "conscientious" objector, that he was "as genuinely and profoundly governed by his conscience as would have been a martyr obedient to an orthodox religion." In brief, the Act defines religion so as to exclude conscientious objectors such as the appellee who are not pacifists. Whatever the administrative merit of the prudential considerations advanced by the govern-

ment for defining religion in the Act more narrowly than does the First Amendment, the result is an impermissible distinction which violates the "establishment" clause.

Argument.

I. This Court has Jurisdiction of the Appeal.

Appellee concurs with the government that the "arresting a judgment" clause of the Criminal Appeals Act, 18 U.S.C. 3731, confers jurisdiction upon this Court to review the decision of the district court on direct appeal. *United States* v. *Green*, 350 U.S. 415; *United States* v. *Bramblett*, 348 U.S. 503. Nothing in the district court's opinion suggests, even remotely, that the court based its decision on "independent grounds," *United States* v. *Hastings*, 296 U.S. 188, 193, rather than on the invalidity of the Act. It held:

> ". . . this court holds that the free exercise of religion clause in the First Amendment and the due process clause of the Fifth Amendment prohibit the application of the 1967 draft act to Sisson to require him to render combat service in Vietnam. . . .
> [Alternatively]:
> "This court, therefore, concludes that in granting to the religious conscientious objector but not to Sisson a special conscientious objector status, the Act, as applied to Sisson, violates the provision of the First Amendment that 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.'
> "In the words of Rule 34, the indictment of Sisson 'does not charge an offense.'
> "This court's 'decision arresting a judgment of conviction for insufficiency of the indictment . . . is based

upon the invalidity . . . of the statute upon which the indictment is founded' within the meaning of those phrases as used in 18 U.S.C. Section 3731." (A. 261, 263.)

The decision squarely holds the Act unconstitutional as applied to Sisson. There is no dispute as to the specific facts relied on by the district court as to the nature of appellee's beliefs (Brief, p. 33), so that in essence the case is here upon an agreed statement of facts. *United States* v. *Halseth,* 342 U.S. 277. The "essence of the ruling" of the district court, *United States* v. *Wayne Pump Co.,* 317 U.S. 200, 206-207, is that the Act is unconstitutional. This Court therefore clearly has jurisdiction of the ". . . appeal . . . taken by and on behalf of the United States . . . From a decision arresting a judgment of conviction for insufficiency of the indictment . . . based upon the invalidity . . . of the statute upon which the indictment is founded." 18 U.S.C. 3731.

In its order of October 13, 1969, the Court also requested discussion of the issue of jurisdiction under the "motion in bar" and "decision . . . setting aside, or dismissing" subdivisions of 18 U.S.C. 3731.

Despite the government's lengthy argument reaching the opposite conclusion (Brief, pp. 12-29), the appellee urges, albeit tentatively, that these two clauses may be viewed as also conferring jurisdiction of the appeal upon this Court.[1] The legislative history of the 1907 Act, 34 Stat. 1246, if it proves anything, proves that ". . . It [was] not proposed to give the Government any appeal . . . when the defendant is acquitted. . . ." (Quoted by the government at Brief, pp. 26-27.) Double jeopardy was the pri-

[1] Definitive assertions about a statute which Professor Wright finds "confusing" are not appropriate. 1 Wright, Federal Practice and Procedure, p. 399, n. 24 (1969).

mary concern, and in holding that the 1907 statute did not conflict with the Fifth Amendment, *United States* v. *Macdonald,* 297 U.S. 120, 127 (decided seven months after enactment of the Criminal Appeals Act), Mr. Justice Holmes cited *Kepner* v. *United States,* 195 U.S. 100, wherein, in a dissenting opinion, he had marked the limits of "jeopardy":

> "But there is no rule that a man may not be tried twice in the same case. It has been decided by this court that he may be tried a second time, even for his life, if the jury disagree [citations omitted], or, notwithstanding their agreement and verdict if the verdict is set aside on the prisoner's exceptions for error in the trial. [Citations omitted.] He may even be tried on a new indictment if the judgment on the first is arrested on motion. . . ." 195 U.S. 100, 134-135.

As the Court of Appeals for the Second Circuit suggested in *United States* v. *Zisblatt,* 172 F. 2d 740, ". . . there is also a more than plausible argument for saying that . . . [the motion in bar] where the defendant had 'not been put in jeopardy,' . . . clause only meant that [the Supreme Court] should not intervene when the Constitution forbad intervention." 172 F. 2d 740, 742-743. With respect to the "decision . . . setting aside or dismissing" clause, the legislative history is not helpful—the government describes it as "confusing" (Brief, p. 25), but it is not unreasonable to conclude that "double jeopardy" as articulated in the then recent *Kepner* decision, *supra,* was a constitutional limit incorporated—by silence—into this clause: the legislators, naturally enough, appear to have been uncertain about the dimensions of the Fifth Amendment prohibition against double jeopardy and, therefore, having recognized the problem, left it up to the courts to resolve the issue. Had the draftsmen intended to adopt a formal rather than

a substantive test, it would have been a simple matter to provide that the "decision . . . setting aside" clause would be applicable, in a jury trial, only where a jury has not been impanelled, or, in a case tried by the court, only before the government began its presentation.

There remains the question whether the decision of the district court may be viewed as a decision dismissing the indictment or granting a motion in bar: since the decision is a complete bar to prosecution against the appellee, it yields the same result as would a decision granting a motion in bar. *United States* v. *Mersky,* 361 U.S. 431, 441, concurring opinion of Mr. Justice Brennan. And since the decision is based on "never-abandoned" issues (A. 249) first urged by the appellee in his pre-trial motion to dismiss and subsequently renewed by moving in arrest of judgment, it may also be proper to view the decision as one dismissing an indictment.

Overlap in the scope of the three clauses of 18 U.S.C. 3731 which provide for direct appeal to this Court presents no occasion for alarm. See remarks of Mr. Justice Brennan in the *Mersky* case, *supra,* at 443, n. 2. Indeed, given the purpose of the Criminal Appeals Act to create "the opportunity to settle important questions of law" in the court of final resort, *United States* v. *Mersky, supra,* at 435, it is hardly surprising that one or more provisions allow a direct appeal to this Court on the important question,

> ". . . whether the government can constitutionally require combat service in Vietnam of a person who is conscientiously opposed to American military activities in Vietnam because he believes them to be immoral and unjust, that belief resting not upon formal religion but upon the deepest convictions and ethical commitments, apart from formal religion, of which a man is capable" (A. 249).

The question of the constitutional limits on the power of Congress to compel military service is properly before this Court.[2]

Also before this Court are the other never-abandoned issues, raised in the district court, that the Act is invalid:

> "While Sisson has raised and not abandoned other issues, most of them have already been disposed of by earlier rulings in this case, *United States* v. *Sisson*, 294 F. Supp. 511, 515, 520 (D. Mass. 1968). Out of an abundance of caution this court repeats the following rulings already made, of which the first is peculiarly pertinent.
>
> "November 25, 1968 this court's opinion held that *under present circumstances*, described in that opinion, *Sisson has the necessary standing to raise the issues he tenders.* See 294 F. Supp. 511, 512-513.
>
> "The same opinion held that this court has no jurisdiction to decide the 'political question' whether the military actions of the United States in Vietnam require as a constitutional basis a declaration of war by Congress.
>
> "November 26, 1968 in a second opinion this court held that it has no jurisdiction to decide the 'political question' whether American military operations in Vietnam violate international law. The holding is ex-

[2] Appellee does not agree with the suggestion of the government (Brief, p. 36, n. 9) that if this Court has no jurisdiction of the appeal, the decision is nonetheless appealable to the Court of Appeals. For if this Court were held to lack jurisdiction, this would be so not because the district court did not hold the Act invalid—which it plainly did, but because the decision (for unimaginable reasons) would have been construed as a decision which granted neither a motion in arrest of judgment, nor a motion in bar, nor a motion to dismiss the indictment—and in that event, the decision would not be appealable at all.

panded and clarified in this court's order of December 3, 1968." (A. 249-250.)

It is open to this Court to inquire whether the judgment of the district court can be sustained upon rejected grounds which challenge the constitutionality of the Act. *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 329-330; *United States* v. *Spector*, 343 U.S. 169, 172; *United States* v. *Kahriger*, 345 U.S. 22, 33, n. 14; *United States* v. *Grainger*, 346 U.S. 235, 239-240, n. 8; Hart & Wechsler, The Federal Courts and the Federal System, pp. 1365-1366 (1953); Wright, Handbook of the Law of Federal Courts, p. 413 n. 30 (1963); Stern & Gressman, Supreme Court Practice, p. 41 (1969).[3]

United States v. *International Union United Automobile, Aircraft & Agricultural Employment Workers of America*, 352 U.S. 567, does not preclude consideration of the constitutional issues presented by the appellee both in the district court and in this Court, for in that case the Court simply held that the constitutional issues would at least be refined, and perhaps be rendered unnecessary, by remanding the case for trial. In the present case, however, trial on the merits has already occurred, and the district court was clearly of the opinion that the constitutional issues raised by the appellee are ripe for determination by this Court:

> "Hence any constitutional issue whatsoever which defendant alleged as a ground for having judgment arrested remains open in an appellate court . . .
>
> ". . . Therefore, 'an appeal may be taken by and on behalf of the United States . . . direct to the Supreme Court of the United States.'" (A. 253, 263-264.)

[3] The government does not appear to contest this last point (Brief, p. 52, n. 17).

The government's position on some of the constitutional issues are set forth in its brief in the district court (A. 73-79). On the question of the power of Congress to conscript in times of peace, the government relies on this Court's decision in *United States* v. *O'Brien*, 391 U.S. 367, and other cases (Brief, p. 39, n. 10).

Appellee does not seek to open the whole case on this appeal: he does not tender objections to the form of the indictment nor does he argue that the indictment is insufficient on non-constitutional grounds.

The only issues sought to be presented are constitutional issues which are indispensable to a determination of the case. Moreover, the issues are important. Cf. *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64; *Terminiello* v. *Chicago*, 337 U.S. 1.

II. The Military Selective Service Act of 1967 is Unconstitutional.

A. Congress has No Power to Conscript in Times of Peace.

The power of Congress to conscript in times of national emergencies such as the First and Second World Wars is not here questioned. Appellee assumes that *Arver* v. *United States*, 245 U.S. 366, was correctly decided. Appellee further assumes that Congress has the power to conscript in times of national emergencies such as the Civil War.

What appellee here contends is that the power to conscript exists only in times of such national emergencies, that it does not exist in times of peace. The phrase "times of peace" is here used to mean the absence of a "national emergency," not the absence of a declaration of war: the Civil War, an insurrection, was a national emergency; conversely, a war declared against Santo Domingo would not necessarily reflect a state of national emergency. Ordinarily, however, excepting such extraordinary circum-

stances, whether the Nation is at peace or at war for purposes of the power of Congress to conscript, will depend on whether or not Congress has declared war.

That the power of Congress to conscript for an undeclared foreign war is an open question is ably demonstrated in the dissenting opinion of Mr. Justice Douglas in *Holmes* v. *United States*, 391 U.S. 936, 938-949. Mr. Justice Stewart intimated in that case, as well as in *Mora* v. *McNamara*, 389 U.S. 934, that he also regards the question as presently unresolved.

Since the "undeclared foreign war" here involved is the Vietnam war, one preliminary point concerns the appellee's "standing" to raise questions involving that war. Strictly speaking, the character of the war is not relevant at this point in the brief, for appellee is simply challenging the power of Congress to conscript—and he certainly has standing to do that. Beyond that, appellee would not have been subject to induction were it not for the Vietnam war. The strength of the Army rose from 1,075,000 soldiers in 1965, to 1,463,000 soldiers in 1968.[4] The number of military forces assigned to Vietnam increased from 23,300 in 1964 to 536,100 in 1968, and the number of men conscripted for military service increased from 74,000 in 1963, to 340,000 in 1968.[5] The Selective Service newsletter for July 1969, U.S. Government Printing Office, reports at page 4 that, according to a recent letter from the Secretary of the Army, Stanley R. Resor, to the editor of the Washington Post, at least 2 out of every 3 men entering the Army either by induction or enlistment are assigned to a short-tour area such as Vietnam or Korea, and for the past two years the

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[4] U.S. Bureau of the Census Statistical Abstract of the United States, 1969 (90th Ed.), Wash. D.C. 1969, p. 256, Table No. 374.

[5] Statistical Abstract of the United States, 1969, *op. cit.*, p. 256, Table No. 373 and p. 257, Table No. 377, respectively.

policy of the Army has been to assign soldiers to Vietnam who have had no previous Vietnam duty.

Thus, the causal relation between the Vietnam war and the induction order which the appellee refused to obey is abundantly clear. That order was issued pursuant to section 4(a) of the Act which purports to authorize conscription for an undeclared war:

> "The President is authorized, from time to time, *whether or not a state of war exists,* to select and induct into the Armed Forces of the United States . . . such number of persons as may be required to provide and maintain the strength of the Armed Forces. . . ." (Emphasis added.)

It follows that the appellee has standing to challenge the power of Congress to conscript, or by the Act to authorize conscription, for an undeclared foreign war. See also the district court's discussion on standing (A. 80-82), and Note, 83 Harv. L. Rev. 453, 462-464 (1969).

* * * * * *

No attempt can here be made to present an exhaustive discussion of the historical record in its full panoply. See generally, Friedman, Conscription and the Constitution: the Original Understanding, 67 Mich. L. Rev. 1493 (June 1969); Freeman, The Constitutionality of Peacetime Conscription, 31 Va. L. Rev. 40 (1944); Lawyers' brief printed in the Congressional Record at the request of Senator Wheeler, 86 Cong. Rec. 5206-5210; Black, The Selective Draft Cases—A Judicial Milepost on the Road to Absolutism, 11 Boston U. L. Rev. 37 (1931).

Nor will any attempt be made to analyze precedents, for the question is assumed to be an open one. Of historical interest is Chief Justice Taney's essay declaring the unconstitutionality of the Civil War draft statute. Taney,

Thoughts on the Conscription Law of the United States—Rough Draft Requiring Revision, 18 Tyler's Historical & Genealogical Magazine, 74 (1936)—the original manuscript is available at the Public Library for the City of New York.

Rather, the focus herein will be on the Conscription Act proposed by Secretary of War Monroe in 1814, two years after war against Great Britain had been declared, two months after Washington, D.C., was occupied and burned. Congress at that time not only rejected Monroe's plan, but in fact could not bring itself to enact a relatively mild law calling a part of the state Militia into service. The concreteness of the emergency (which appellee concedes would justify resort to conscription), together with the relatively short lapse of time from the adoption of the Constitution to the War of 1812, lend the debates and history of the proposed 1814 act substance and authority as aids in interpreting the constitutional provisions delegating to Congress the power to raise armies. (Since the "constitutional grants and limitations of power are set forth in general clauses . . . the process of construction is essential to fill in the details." *Home Building & Loan Association* v. *Blaisdell,* 290 U.S. 398, 426.) After concluding the discussion of the 1814 proposal, the Federalist Papers will be examined briefly to show that they support the conclusions based on the history of that proposal.

The Monroe Proposal for Conscription.

Twenty-five years elapsed between the adoption of the Constitution and submission of the first conscription bill to Congress on October 17, 1814. War against Great Britain had been declared on June 18, 1812, after Congress ". . . had increased the *authorized* Regular Army strength to 35,603 officers and enlisted men. In addition, the Pres-

ident had been authorized to mobilize 30,000 Federal Volunteers, 100,000 State Militia, and a handful of Federal Rangers, making a total authorized strength for the land forces of about 166,000 men."[6] As of June 5, 1812, the Regular Army numbered 6,744 men out of an authorized strength of 35,000. On January 20, 1813, the authorized strength of the Regular Army was increased to 58,354, but in February 1813 only 19,036 men were in regular service.[7]

> "Recruiting for the Regular Army was as slow and discouraging as it had been during the Revolutionary War and for the same reasons. The greater attractiveness of short-term Militia tours with their high bonuses and the absence of any kind of compulsion to bring men into the service were handicaps which the Regular Army recruiting teams with small immediate $16 bonuses and nebulous future land grants could not overcome."[8]

Secretary of War Monroe attributed the failure of recruiting for the Regular Army ". . . principally to the high bounty given for substitutes by the detached Militia. Many of the Militia detached for six months have given a greater sum for substitutes than the bounty allowed by the United States for a recruit to serve for the war."[9]

As of December 29, 1813, the total number of Federal Volunteers probably did not exceed 5,000 out of an authorized strength of 30,000. "It was easy to understand this reluctance to enlist for eighteen months [in the Federal Volunteers] or for five years [in the Regular Army] when

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[6] Kreidberg & Henry, History of Military Mobilization in the United States Army 1775-1945, Department of the Army Pamphlet No. 20-212, June 1955 (hereinafter cited as "Kreidberg"), p. 44.

[7] *Id.*, pp. 46-47.

[8] Kreidberg, *op. cit.*, p. 47.

[9] American State Papers, Military Affairs, I, p. 519.

glory, martial ardour, and financial enrichment could be satisfied by a two- or three-months tour in the Militia." [10] Mobilization of the state Militia was hampered by the refusal of the governors of Massachusetts, Connecticut and Rhode Island to supply their assigned quotas of Militia for a war they considered unconstitutional and illegal.[11] Moreover, the utility of Militia for a war contemplating the invasion of Canada was limited, for serious questions were raised ". . . concerning the legality of the Federal Government's employing Militia outside the United States or even outside its home state." [12] A number of Militia in fact refused to cross the border into Canada.[13]

By April 1814, the British had defeated the French and were preparing to use their vast military forces against the United States, a threat which had the effect of stimulating enlistments:

> "But men who would not take arms to invade Canada would do so when British redcoats appeared again as invaders in their own country, and by September the Regular Army climbed to about 35,000. About an equal number of men took the field in volunteer militia organizations on extended duty, so that late in the year the federal government and the states together could muster nearly 70,000 men in active service. This number was exclusive of those men who served for short periods against British raids and invasions in their own districts and who may have numbered in the hundreds of thousands." [14]

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[10] Kreidberg, *op. cit.*, pp. 46, 47.

[11] *Id.*, p. 46.

[12] *Id.*, p. 47.

[13] Weigley, History of the United States Army, 1967, p. 120.

[14] *Id.*, p. 121.

Then came the defeat at Bladensberg on August 24, 1814, when the British ransacked Washington and burned the Capitol and the White House.

On September 23, 1814, the Senate resolved "That the Committee on Military Affairs be instructed to inquire into the state of preparations for the defense of the City of Washington, and whether any further provisions, by law, be necessary for that object." [15] The Chairman of the Senate Committee on Military Affairs thereupon inquired of Secretary of War Monroe "What are the defects in the present military establishment" and "What further provisions, by law, are deemed necessary to remedy such defects." [16] On October 17, 1814, Monroe responded by submitting four alternate plans for increasing the manpower of the Regular Army, the first of these plans suggesting resort to conscription.[16]

Thereupon, on October 19, 1814, the Senate Committee on Military Affairs inquired of Monroe "Whether any defects have been heretofore discovered in the existing provisions for filling the ranks of the regular army?" [17] And on October 24, 1814, the Committee inquired further: "Has such failure [in recruiting] arisen from any failure to place the requisite sums of money in the hands of the recruiting officers; or has it arisen from the indisposition of the citizens to enlist?" [18] The inquiry was referred to the Army Paymaster who, on October 26, 1814, informed Monroe: "That pressing calls for very considerable sums of money for the recruiting service have been made on him for about three months past, which he has been able

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[15] 1 American State Papers, Military Affairs, p. 514.

[16] *Id.*, pp. 514-517.

[17] *Id.*, p. 517.

[18] *Id.*, p. 518.

but partially to supply."[19] On December 10, 1814, Congress enacted modified versions of Monroe's fourth alternative plan, by doubling the land bounty from 160 to 320 acres, and of his third alternative plan, by exempting from Militia duty any person who at his own expense furnished a recruit willing to serve in the Regular Army for the duration of the war. 3 Stat. 147.

Turning now to Monroe's proposals, reference is made in a preface to the existing emergency: "A nation contending for its existence against an enemy powerful by land and sea . . . It is the avowed purpose of the enemy to lay waste and destroy our cities and villages, and to desolate our coast. . . ."[20] The first plan is then described in six very brief paragraphs: The free male population between the ages of 18 and 45 is to be formed into classes of one hundred men, each class to provide four men for the duration of the war; if any class fails to provide its quota within a specified time, the quota of men is to be drafted from that class—but any man so drafted is permitted to furnish a substitute; land and money bounties are to be paid each draftee by assessing the taxable property of the inhabitants of the precinct wherein the class resides.[21]

The description of the draft plan is immediately followed by a long argument that the plan is constitutional, because "It would be absurd to suppose that Congress could not carry this power into effect, otherwise than by accepting the voluntary service of individuals," and especially because, in Monroe's view, Militia are no match for "regular, well disciplined troops."[22] (Monroe's pole-

[19] *Id.*, p. 519.

[20] *Id.*, p. 514.

[21] *Id.*, p. 515.

[22] *Id.*, pp. 515-516.

mic against the Militia calls to mind his role in the Bladensberg disaster).[23]

Significantly, Monroe again stressed the existing crisis: "In proposing a draught [sic] as one of the modes of raising men, *in case of actual necessity, in the present great emergency* of the country. . . ."[24]

Monroe's second plan called for dividing the Militia into three age groups, 18-25, 25-32, and 32-45, and authorizing the President to call into service any portion of such groups for a period of two years. The plan left intact the prerogative of the states, under section 2 of the Act of May 8, 1792, 1 Stat. 253, to exempt any person from Militia duty. However, the plan did attempt to repeal the provisions of the Act of February 28, 1795, 1 Stat. 389, which authorized the President to call out the Militia to execute the laws of the Union, suppress insurrections and repel invasions, declaring that no member of the Militia called into service,

> ". . . shall be compelled to serve more than three months after his arrival at the place of rendezvous, in any one year, nor more than in due rotation with every other able bodied man of the same rank in the battalion to which he belongs."

Under the 1792 Act, all men aged 18 to 45 not exempted by state law were required to be enrolled in the Militia. 1 Stat. 252. Thus, Monroe's second plan would have altered the 1795 Militia legislation in three respects: first, it contemplated use of Militia for purposes other than executing the laws, suppressing insurrections and repelling invasions (in his prefatory remarks, Monroe advises "push-

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[23] ". . . Monroe disposing troops without authority and contributing to a situation in which three American battle lines were so deployed as to be incapable of supporting each other." Weigley, *op. cit.*, p. 122.

[24] 1 American State Papers, Military Affairs, p. 515.

ing the war into Canada" [24]); second, it extended the tour of active service to two years; and third, it eliminated the rotation requirement and contemplated using only ". . . the unmarried and youthful, who can best defend [the State], and best be spared. . . ." [25]

The third plan proposed to exempt from Militia duty every five men who furnished one recruit for the duration of the war, and the fourth plan proposed an increase in the land bounty of 100 acres for each year the war continued. As noted earlier, Congress enacted variations of the third and fourth plans by exempting from Militia duty each man who produced one recruit and by doubling the land bounty from 160 to 320 acres.

Debate, in both the House and Senate, was eloquent and passionate—and lengthy. The significant fact, however, is that Monroe's first plan was not adopted by either the House or the Senate. Indeed, the plan was not even endorsed either by the Senate Military Affairs Committee or by the House Military Committee. Instead, the Senate Committee proposed a hybrid of Monroe's first, second and third plans: the President was directed to call into service 80,430 Militia to serve for a period of two years, such Militia to be provided from groups of 25 men into which the entire Militia were to be classified; each group was to supply one Militia, either voluntarily or by draft, but three groups (75 men) would be exempted from such obligation for Militia duty if they furnished 2 recruits for the Regular Army for the duration of the war.[26] Militia thus called into service were not to cross national frontiers nor be used beyond the limits of the state of residence or of an adjoining state, "except that the militia from Kentucky and Tennessee may be required to serve in the

[24] 1 American State Papers, Military Affairs, p. 515.

[25] *Id.*, p. 516.

[26] 28 Annals of Congress, p. 93.

defense and for the protection of Louisiana."[27] Moreover, such Militia were to serve under officers appointed by the state governors.[28]

On November 22, 1814, the Senate approved this bill by a vote of 19 to 12,[29] overriding the extensive denunciations of Senators Varnum, Daggett, Mason, Gore, and Goldsborough.[30] The Annals of Congress do not report any lengthy defense of the bill in the Senate.

The bill as approved by the Senate was transmitted to the House on November 23.[31] The House amended the bill by deleting the territorial service restrictions for Militia,[32] reducing the length of service from 2 years to 1 year,[33] exempting conscientious objectors,[34] and authorizing the President to call directly on Militia officers in the event a governor refused to comply.[35] Daniel Webster's proposal for further reducing the length of Militia service to 6 months was defeated by one vote.[36] As amended, the bill passed the House on December 14 by a vote of 87 to 63.[37]

On December 24 managers for the House and Senate versions conferred and agreed to certain recommendations.[38] However, on December 27 the House refused to accept the recommendations of its conferees for a compro-

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[27] *Id.*

[28] *Id.*, p. 714.

[29] *Id.*, p. 109.

[30] *Id.*, pp. 58-70, 70-77, 77-91, 95-102, and 102-109, respectively.

[31] *Id.*, p. 635.

[32] *Id.*, pp. 713-714.

[33] *Id.*, pp. 775, 869.

[34] *Id.*, pp. 772-774.

[35] *Id.*, pp. 771, 869.

[36] *Id.*, pp. 882-883.

[37] *Id.*, p. 928.

[38] *Id.*, p. 136.

mise Militia duty tour of 18 months,[39] and for abandoning its amendment authorizing the President to go directly to Militia officers if any governor proved recalcitrant.[40] Upon receiving news of the position taken by the House, the Senate on December 28, 1814, tabled the bill [41] without acting on the recommendations of its conferees.

The debates in the House are more useful for present purposes because the views of proponents (Messrs. Duvall, Ingersoll, Moseley, Irving, Harris) [42] as well as opponents (Messrs. Miller, Shipherd, Stockton, Sheffey, Gaston) [43] are well reported. A notable exception is the omission of Webster's speech in opposition to the bill delivered on December 9.[44]

Turning to the debates, when the Senate bill was first considered by the House, on December 2, 1814, Mr. Troup denounced it and advocated support for the bill drafted by the House Military Committee which provided for "classification and penalty" rather than "classification and draft" —as proposed by the House Committee, each group would either provide a recruit for the Regular Army or pay a penalty, instead of providing a member of the Militia. The need, he stressed, was not for more Militia, but for more Regular Army soldiers, and in his view the Senate bill could not accomplish that objective: "But the bill proposes to furnish regular troops. How? by holding up *in terrorem* a militia classification and draught. Exempting every three classes which shall fur-

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[39] *Id.*, pp. 992-993.

[40] *Id.*, pp. 993-994.

[41] *Id.*, p. 141.

[42] *Id.*, pp. 800-807, 808-819, 830-833, 863-868, and 885-897, respectively.

[43] *Id.*, pp. 775-799, 819-830, 834-850, 850-859, and 922-928, respectively.

[44] Reproduced in The Selective Service Act, Special Monograph No. 2, Vol. III, pp. 157-163, U.S. Gov. Print. Off. 1954.

nish two regular soldiers, from the liability to furnish three militiamen." The scheme was bound to fail, maintained Troup, because the three classes would simply lure and provide to the Army the same two persons who otherwise would be recruited for the Army without the classes as intermediaries.[45] In response, Mr. Calhoun favored action on the Senate bill because, if the House approved, it would immediately become law. Moreover, he considered the differences between the House and Senate bills unimportant: "Should the bill reported by the gentleman prevail, it would give us either regulars or money; if this bill should pass, we shall have regulars or good militia. Both bills were calculated to produce regulars, if they could be obtained by purchase."[46] At this point, the House adopted Calhoun's position and proceeded to consider the Senate bill.

To the charge that Congress had no power to conscript, defenders of the bill replied that it was a Militia bill, not a conscription bill: Mr. Duvall, noting that "This bill has been called conscription, for the purpose of rendering it odious to the people," observed that it differed from existing Militia laws only in extending the tour of duty from 6 months to 1 year and in providing exemption from Militia duty as an inducement for recruiting Regular Army personnel.[47] Well, then, Militia could only be called into service to execute the laws, quell insurrections or repel invasions, argued the opponents. To that argument, proponents answered that the existing crisis was the best example of an invasion or imminent threat thereof and, for that reason alone, calling on the Militia was entirely appropriate.[48]

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[45] 28 Annals of Congress, pp. 705-711.

[46] *Id.*, p. 712.

[47] *Id.*, pp. 801-802; see also remarks of Mr. Rhea, *id.*, p. 897.

[48] *Id.*, Mr. Farrow, pp. 921-922; Mr. Harris, p. 886.

But all opponents and most proponents agreed that the bill was, in Mr. Gaston's phrase, "[a] contrivance for compelling the militia to find recruits for the regular army."[49] It was with that understanding, that regular troops and not Militia were sought to be raised, that the bill was debated.

Proponents of the bill relied on arguments of expediency: Mr. Irving observed that the British peace terms were not acceptable; that present means were not sufficient to raise ". . . an army adequate to the exigencies of the present crisis"; that having found the Militia ("the usual resource") unequal to the task, and having exhausted the possibilities of regular enlistments, it could not be the case that Congress was powerless to act "When our army is composed of a mere handful of men, and our treasury empty, so that it cannot provide for this gallant handful; when an enemy, powerful and active, is beating against our shores like the strong wave of the ocean. . . ." Irving bluntly asserted:

> ". . . For my part, sir, I cannot find in the Constitution any one principle that militates against classification any more than against a draught, or conscription as some gentlemen call it. If there was, cases might occur, even then, to justify such a measure, as indispensable to self-defense, which, *while that necessity lasts,* supersedes all other laws but those of nature."[50] (Emphasis added.)

Mr. Ingersoll was impatient with the constitutional objections to the bill: "To be insensible to the extreme importance of time at this crisis is to be insensible to the crisis itself . . . As to the constitutionality of this measure, I refuse to argue it."[51]

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[49] *Id.*, p. 923.

[50] *Id.*, pp. 863-865, 868.

[51] *Id.*, pp. 808, 818.

The opponents, on the other hand, were anxious to argue constitutionality and they were most effective in attacking conscription—but less persuasive in attacking the bill which, after all, came so very close to a prototype militia bill. Mr. Stockton made the following points: "the rights of the militia were long known and universally acquiesced in, before the Government acquired its qualified jurisdiction over them"; the bill "deprives the militiaman of inherent fundamental rights; among these rights is the right not to be called except for the three purposes specified in Article I, Section 8—and the bill does not limit use of militia to those three purposes; the related right to be discharged when the exigency no longer exists—but the bill calls for a fixed tour of duty, whether of one or two years does not affect the principle; the right not to be called for duty except in the militiaman's own state and contiguous states—but the House eliminated that restriction from the Senate bill; and the right to be called in rotation:

> "All cannot be called forth at a time, or the country would become a desert. Hence the right of each man is, that he shall only be called into actual service in just rotation with all others. To declare by law that one class shall absolutely serve for one, two, or ten years, is entirely unjust and illegal. Substantially, it makes them regular soldiers."[52]

Mr. Sheffey, as had Mr. Stockton, conceded the state of emergency:

> "I am conscious of the awful crisis at which the affairs of this country have arrived; with him [Stockton], I admit that ruin is staring us in the face on every side."[53]

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[52] *Id.*, pp. 844-846.

[53] *Id.*, p. 850.

But the crisis could not serve to justify imposing the "shackles of domestic slavery" on the people. Concerning Monroe's claim that the unqualified grant of power to "raise and support armies" carries with it the power of conscription, Sheffey argued:

> Hence, the honorable Secretary infers, that you have the power to drag the citizen from the land of his birth, to be slaughtered on the plains of Canada. To force the father, the only support of a destitute family, and the son, the comfort of his aged parents, to undergo the miseries of a camp in a foreign country . . . I deny the right to convert a nation of freemen into slaves, under any pretense whatever . . .
>
> The power to "borrow money" is as unrestrained as the power to "raise and support armies." . . . You have used every effort to borrow money, in the ordinary mode, "in vain" . . . In truth, the Government is on the verge of bankruptcy! Now, with this convenient power at your command, why not borrow money at the point of the bayonet? . . .
>
> if the construction given to the Constitution by the Secretary of War is correct, you have the power to take by violence the ships of your merchants, and convert them into ships of war, and man your navy by impressment . . . The power "to provide and maintain a navy" is wholly unrestricted.

Continuing his analysis, Sheffey recalls that in the 46th number of the Federalist, Madison had written that federal encroachment upon the authority of a state would certainly lead to a unified show of strength by the states: "The same combination, in short, would result from an apprehension of the Federal, as was produced by the dread of a foreign yoke; and unless the projected innovation should be voluntarily renounced, the same appeal to a

trial of force would be made in the one case as was made in the other,'' [54] and concluded that the ability of the states so to defend themselves was inconsistent with the notion that Congress could conscript Militia into the Regular Army.

Similarly, Mr. Ward reasoned:

> ''Congress have power to establish post offices and make post roads; but no person ever supposed that they could chain the citizens to wheelbarrows, and make them work against their will. The power of Congress to raise armies must be exercised in such a manner as is consistent with the people enjoying '' 'the blessings of civil liberty.' '' [55]

''This bill also attacks the right and sovereignty of the State governments,'' accused Mr. Stockton. ''Congress is about to usurp their undoubted rights—to take from them their militia'':

> ''By this bill we proclaim that we have their men, as many as we please; when and where, and for so long a time as we see fit, and for any service we see proper.'' [56]

Mr. Ward also warned against yielding to expediency:

> ''The exigencies of the country, I agree, are pressing, and those who are influenced by an honest zeal to serve it, do not merit reproach. But every feeling of impatience at Constitutional restraint, and every propensity to assume unconstitutional power, are germs of tyranny, and ought to be destroyed in embryo . . .

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[54] *Id.*, pp. 850-856.

[55] *Id.*, p. 909.

[56] *Id.*, pp. 848-849.

To restrain the passions of men, and the aggressions of power, in such times, is the purpose for which Constitutional rules were made." [57]

But the fears of all opponents were perhaps best expressed by Senator Goldsborough:

"Mr. President, there is a foreboding that arises from all this which fills me with the deepest concern. The growth of tyranny, when once it begins, is strong and rapid. A few years past, and the name of conscription was never uttered but it was coupled with execration; last year, it found its way into a letter from the then Secretary of War to the chairman of the Military Committee, and it was then so odious that it was but little exposed to view. This year, we have conscription openly recommended to us by the Secretary of War in an official paper; and, worst of all, it finds champions and avocates on this floor. . . . And why is all this to be done? The necessity of the crisis is offered as the plea; yes, sir, necessity, that blood-stained plea of tyrants, which has served every scheme of usurpation, to sacrifice the lives and liberty of men . . . Times of imminent peril and alarm, are periods when public liberty is most in danger, and it is difficult to decide whether he is the worthier patriot who goes to battle in defense of a nation's rights, or he who stands the faithful sentinel over the Constitution in times of general effervescence, to guard it from violation and abuse." [58]

In appraising the significance of the above, the following facts ought to be borne in mind: more than two years elapsed between the declaration of war in 1812 and the first

[57] *Id.*, p. 905.

[58] *Id.*, p. 108.

proposal for a conscription bill, and one may doubt whether the proposal ever would have been submitted but for the humiliation suffered at Washington, D.C., in late August, 1814; Wellington's armies, fresh from victory against the French, were to be used against the United States; the British navy controlled the seas; the American army needed recruits desperately; the country was on the verge of bankruptcy. Notwithstanding all these factors, Monroe's conscription plan was not reported out of either the House or Senate Military Committees. And the Senate bill, which was at least colorably a Militia bill although intended indirectly to stimulate Regular Army recruiting, was not enacted. Although the principal sections of the bill were approved by both Senate and House, the propriety of the bill hung in such a delicate balance—even for those who favored it, that the House could not bring itself to concede a 6 months extension in the Militia tour of duty; to Mr. Farrow, who had voted to approve the bill, such an extension would have changed the "militia character of the bill" and, as so amended, the bill "would possess the conscriptive character."[59] In voting for the bill, it cannot be said that Mr. Farrow had voted for the constitutionality of conscription—even in a time of dire national emergency.

But appellee concedes the power of Congress to conscript in times of national emergency such as the war of 1812. No inference may be drawn, however, that an extraordinary power delegated to Congress to meet extraordinary national needs also exists and may be used in ordinary circumstances. The historical record is not ambiguous: in times of peace, Congress is powerless to conscript men into the armed forces. The same conclusion may be drawn from an analysis of the Federalist, written by the advocates of a strong, centralized government.

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[59] *Id.*, p. 992.

Congressional power to conscript in peace time is not consistent with Madison's emphasis on the relative military weakness of the proposed government as contrasted with the supposed military strength of the states.

In numbers 45 and 46 of the Federalist, Madison addresses himself to the question whether ". . . the whole mass of [the powers transferred to the federal government] will be dangerous to the portion of authority left in the several states." In number 46, he writes as follows:

> "But ambitious encroachments of the federal government, on the authority of the State governments . . . would be signals of general alarm . . . Plans of resistance would be concerted . . . The same combinations, in short, would result from an apprehension of the federal, as was produced by the dread of a foreign, yoke; and unless the projected innovations should be voluntarily renounced, the same appeal to a trial of force would be made in the one case as was made in the other. But what degree of madness could ever drive the federal government to such an extremity . . .
>
> *The only refuge left for those who prophesy the downfall of the State governments is the visionary supposition that the federal government may previously accumulate a military force for the projects of ambition.* The reasonings contained in these papers must have been employed to little purpose indeed, if it should be necessary now to disprove the reality of this danger. That the people and the States should, *for a sufficient period of time,* elect an uninterrupted succession of men ready to betray both; that the traitors should, throughout this period, uniformly and systematically pursue some fixed plan for the extension of the military establishment; that the governments and

the people of the States should silently and patiently behold the gathering storm, and continue to supply the materials, until it should be prepared to burst on their own heads, must appear to everyone more like the incoherent dreams of a delirious jealousy, or the misjudged exaggerations of a counterfeit zeal, than like the sober apprehensions of genuine patriotism. Extravagant as the supposition is, let it however be made. Let a *regular army*, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the federal government; still it would not be going too far to say, that the State governments, with the people on their side, would be able to repel the danger. The highest number to which, according to the best computation, a *standing army* can be carried in any country, does not exceed one hundredth part of the whole number of souls; or one twenty-fifth part of the number able to bear arms. This proportion would not yield, in the United States, an *army* of more than twenty-five or thirty thousand men. To these would be opposed a *militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves*, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence. It may well be doubted, whether a *militia* thus circumstanced could ever be conquered by such a proportion of *regular troops.*" (Emphasis added.)

The clear import of Madison's words is that the states have nothing to fear since they will always have military superiority over the federal government. In the first place, asserts Madison, the federal government cannot accumulate a regular army (standing army, army, or regular troops—the words are used interchangeably) of threatening propor-

tions except over a long period of time, spanning many congressional elections. The dynamics of growth of an army which Madison describes do not bear the earmark of conscription—which can augment an army in a very short space of time. Rather, they bear the earmark of a painstaking process for recruiting volunteers into the regular army, with long enlistments, and an ever-increasing budget which must be reviewed at least every two years.

Even if a federal army of menacing size is accumulated, adds Madison, the states can rely on their militia, armed and officered by men of their own choosing. This supposed balance of military forces would be a callous fraud if Congress had the power to conscript the militia into the regular army.

Even in case of national emergency, it would be difficult to reconcile Madison's explanations with the existence of congressional power to conscript. In times of peace, it is not possible.

The conclusion is buttressed by examining others of the Federalist papers. In number 45, Madison explains that, with few exceptions, the Constitution simply carries over the powers already contained in the Articles of Confederation, and does so without expanding them:

> "If the new Constitution be examined with accuracy and candor, it will be found that the change which it proposes consists much less in the addition of NEW POWERS to the Union, than in the invigoration of its ORIGINAL POWERS. The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose, and from which no apprehensions are entertained. *The powers relating to war and peace, armies and fleets,* treaties and finance, with the other more considerable powers, *are all vested in the existing Congress* by the articles of Confederation.

The proposed change does not enlarge these powers; it only substitutes a more effectual mode of administering them. The change relating to taxation may be regarded as the most important. . . ." (Emphasis added.)

Comparison of the Articles of Confederation with the Constitution indeed shows a close correspondence.[59A]

The Constitution delegates to Congress a very limited power over state militia which the Confederate Congress did not possess. But, according to Madison, the power of Congress over armies, being one of the powers already vested in the Confederate Congress, is not enlarged under

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[59A] Constitution, Article I, Section 8, *11th clause:* "To declare War, grant Letters of Marque and Reprisal, and makes Rules concerning Captures on Land and Water," has its counterpart in the 1st paragraph of Article IX: "The United States in Congress assembled, shall have the exclusive right and power of determining on peace and war . . . of granting letters of marque and reprisal in times of peace . . . of establishing rules for deciding in all cases, what captures on land and water shall be legal. . . ." *12th clause:* "To raise and support Armies, but no appropriation of Money to that Use shall be for a longer Term than two Years," has a counterpart in the 5th paragraph of Article IX: "The United States in Congress assembled shall have authority . . . to agree upon the number of land forces, and to make requisitions from each State for its quota . . . which requisition shall be binding. . . ." *13th clause:* "To provide and maintain a Navy," has its counterpart in the fifth paragraph of Article IX: ". . . to build and equip a navy." *14th clause:* "To make Rules for the Government and Regulation of the land and naval Forces," has its counterpart in the 4th paragraph of Article IX: "The United States in Congress assembled shall have the sole and exclusive right and power of . . . making rules for the government and regulation of the said land and naval forces. . . ." The significant exception is the absence of a counterpart for the militia clauses (15th and 16th): no power was delegated to the Confederate Congress with respect to the militia, but by the 4th paragraph of Article VI of the Articles of Confederation, ". . . every State shall always keep up a well regulated and disciplined militia. . . ."

the Constitution. He cites the change in the power of taxation as perhaps the most important.

The Confederate Congress had no power whatsoever to conscript. Indeed, when raising land forces for the Continental Army, the states tried at all cost to avoid resorting to conscription from the militia, as illustrated in Thomas Jefferson's letter of May 16, 1777, to John Adams:

> "Our battalions for the continental service were some time ago so far filled as rendered the recommendation of a draught from the militia hardly requisite, and the more so as in this country *it ever was the most unpopular and impracticable thing that could be attempted.* Our people, *even under the monarchial government,* had learnt to consider it as the last of all oppressions."[60] (Emphasis added.)

Can it seriously be contended that the Constitution delegated to Congress "the most unpopular and impracticable" power that could be attempted, a power considered "the last of all oppressions" even under the monarchy? And if the power—to conscript *in times of peace* no less, had been delegated by the Constitution, would it have constituted such a trivial change from the power of the Continental Congress over armies as not to be worthy of mention by Madison? *Even in the midst of the Revolution,* the power was feared and despised. Can it then be assumed that the power to conscript *in times of peace* was delegated to Congress *sub silentio?*

The contributions to the Federalist written by the staunchest federalist of the time, Alexander Hamilton, lead to the same conclusion—Congress has no peacetime conscription power. In number 23, after noting the weakness

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[60] Adams, Life and Writings of John Adams, Vol. 9, Boston (1854), p. 465.

of the requisition scheme used under the Articles of Confederation, Hamilton asserts:

> ". . . the Union ought to be invested with full power to levy troops; to build and equip fleets; and to raise revenues which will be required for the formation and support of an army and navy, *in the customary and ordinary modes practiced in other governments.*" (Emphasis added.)

It is easily demonstrable that at the time Hamilton wrote, it was neither customary nor ordinary to raise a *regular army* by conscription. Nor can the practice be inferred from resort to compulsory service for the militia, because "The local and temporal limitations sharply distinguish it from professional military forces." Mahon, "Military Service," 15 Encyclopaedia Britannica 453 (1969).

Hamilton's use of the word "levy" in the above quotation should not be misunderstood: in number 22 of the Federalist, Hamilton refers to the Revolutionary War experience, when the States found it difficult to meet their quotas for the Continental Army:

> "The hope of still further increase [in bounties] afforded an inducement to those who were disposed to serve to *procrastinate their enlistment*, and disinclined them from engaging for any considerable periods. *Hence, slow and scanty levies of men,* in the most critical emergencies of our affairs . . . Hence, also *those oppressive expedients* for raising men which were upon several occasions practiced, and which nothing but the enthusiasm of liberty would have induced the people to endure." (Emphasis added.)

Thus, Hamilton not only defines the word "levy" to mean recruiting enlistees, but he distinguishes it from the occa-

sional use of conscription by the states during the Revolutionary War. Consequently, when, in number 23 of the Federalist, Hamilton advocated "full power to levy troops . . . in the customary and ordinary modes," he certainly was not suggesting that Congress should have the power of raising armies through the "oppressive expedient" of conscription. As he expresses it in number 30 of the Federalist, he is advocating ". . . the power of providing for . . . the expense of raising troops"—professional, volunteer troops.

In numbers 24 through 29 of the Federalist, Hamilton argues the need for standing armies, small, professional, as to relieve the Militia of the necessity for manning frontier garrison posts (Number 24), armies which cannot seriously threaten the sovereignty of the states who have available and can depend on their more numerous Militia.

None of these writings make sense, unless as a calculated attempt to deceive, if the Constitution is interpreted as delegating to Congress the power to conscript in times of peace.

What these writings and the debates of the constitutional convention show is that the Federalists were fighting to overcome the strong prejudice against peace time armies: for instance, John Trenchard's well-known polemic against standing armies "History of Standing Armies" was quoted in connection with the Boston Massacre. Bernard Bailyn, The Ideological Origins of the American Revolution (Harvard 1967) pp. 35-36, 116; David L. Jacobson, Ed., *The English Libertarian Heritage, from the Writings of John Trenchard and Thomas Gordon* (Bobbs-Merrill 1965) pp. 215-230. The standing armies advocated by the Federalists were to be professionals—as was customary, and they were to be supplemented in times of stated emergency by the

Militia. Nothing suggests that the Federalists, considered, let alone proposed, that Congress have the power to conscript in peacetime.

B. At Most, the Constitution Delegates to Congress a Power of Conscription to "Raise and Support Armies" to the Extent that Such Power is "Necessary and Proper."

1. The Act as administered is being used not "to raise and support armies," for which conscription is not now needed, but to control civilian behavior, thus exceeding Congress's delegated power and depriving civilians of liberty without due process.

As demonstrated above, even the persons who asserted the existence of congressional power to conscript, as an adjunct to the delegated power to raise and support armies, qualified the assertion by emphasizing that it was an "emergency" power, a power whose inferred existence was demanded by the necessity and urgency of the crisis because all other means had been exhausted—as Monroe himself expressed it ". . . in case of actual necessity, in the present great emergency . . ." (see p. 29 above) or as Irving put it, ". . . a measure indispensable to self-defense, which, while that necessity lasts, supersedes all other laws . . ." See p. 34 above.

The power is coextensive with the necessity, and it lapses when the emergency does. In 1814, at a peak of the national crisis, the hardiest exponents of federal power claimed nothing more. Indeed, no one claimed a greater scope for the power until after the Second World War.

But assuming, *arguendo*, that Congress has a power to conscript in times of peace, that power obviously is not unlimited: for instance, Congress has no power to compel

those who are drafted to spend the rest of their lives on active duty in the armed forces, or to conscript the entire male population into the army for the next two years. Yet these limitations are not expressed in the Constitution—of course, the underlying power is itself not expressed. These and other limitations arise from the nature of the power which, by assumption, the Constitution delegates to Congress.

The framers of the Constitution certainly delegated no more power to conscript than was needed to meet national crises. It follows, as an independent limitation on the delegated power, that, so long as the ranks of the regular army can be filled by volunteers, an emergency cannot be said to exist, and Congress is powerless to conscript. If a less burdensome alternative exists, Congress is not free to deprive young men of their liberty.

"Necessity" is not here used to refer to matters involving congressional judgment. Neither the "need" for the number of men presently in the armed forces nor the "need" for the length of service exacted from these men is here questioned. The existence of limitations on, rather than the exercise of, the power is at issue.

Congress has not made a finding of necessity. All the Military Selective Service Act of 1967 provides on this question is: "The Congress declares that an adequate armed strength must be achieved and maintained to insure the security of this Nation." Section 1(b), 50 U.S.C. App. 451(b). This declaration is identical to that contained in the Act's predecessors, the Universal Military Training and Service Act (1951) and the Selective Service Act of 1948.

The matter of an all-volunteer army received considerable attention in the course of the hearings held April 12-19, 1967, by the Senate Committee on Armed Services with re-

spect to S. 1432. (The transcript of these hearings will hereafter be referred to as "Hearings.")

The Assistant Secretary of Defense in Charge of Manpower, Thomas D. Morris, testified as follows:

> "As to pay incentives, we estimated that the additional cost to recruit and maintain an all-volunteer active force of 2.7 million men—the pre-Vietnam level—would range between *$4-$17 billion* annually, depending upon employment conditions in the Nation from year to year and other variable factors. Our best estimate, assuming a 4 percent general unemployment level, is an annual cost of $8 billion." Hearings, p. 60. (Emphasis added.)

Senator Edward M. Kennedy submitted a summary report based on hearings he had chaired during the weeks of March 20 and April 3, 1967, in the Subcommittee on Employment, Manpower and Poverty. The report states:

> "The Department of Defense has estimated the additional cost of maintaining a volunteer army at from *$4-$17* billion a year. . . . It was Professor Friedman's view that these figures were not correct, and that *a volunteer army might even be less costly.*" Hearings, p. 175. (Emphasis added.)

Senator Kennedy, in opposing the all-volunteer concept, further testified as follows:

> "We heard from an articulate proponent of the volunteer army, Prof. Milt Friedman, of the University of Chicago, did indicate that inflexibility was one of the problems. I wonder how much you would have to pay a young person in this country to go fight in the patties of Vietnam. *The best cost estimates of the proponents of the volunteer army envision a $5-$17-*

> *billion* program in peacetime. This was one figure cited by *Walter Oi,* a noted economist from the University of Washington. It has been estimated by the defense department to be $17 billion." Hearings, p. 182. (Emphasis added.)

See also Hearings, p. 105. Prior to these Hearings, a conference on the draft had been held at the University of Chicago, December 4-7, 1966.[61]

Walter Oi submitted a detailed economic analysis of the cost of an all-volunteer force,[62] based largely on research conducted while he served as a consultant for the Office of the Assistant Secretary of Defense from June 1964 to July 1965. Professor Oi concludes his paper as follows:

> "If the current draft law is extended into the decade ahead, it is projected that only 38.5 percent of qualified males will be required to staff a mixed force of 2.65 million men. Since the draft assures adequate supplies of initial accessions, military pay can be kept at artificially low levels. Many servicemen on their first tour can correctly be called reluctant participants who

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[61] Participants included, among others, economist Milton Friedman; Lt. Gen. Lewis B. Hershey, National Director of the Selective Service System, and his assistant, Col. Dee Ingold; Bernard D. Karpinos, Special Assistant for Manpower, Office of the Surgeon General, Department of the Army; Rep. Robert B. Kastenmeier; Sen. Edward M. Kennedy; Timothy McGinley, Special Assistant in the U.S. Department of Labor; Sen. Maurine B. Neuberger; economist Walter Y. Oi; Bradley H. Patterson, Jr., Executive Director of the National Advisory Commission on Selective Service; Rep. Donald Rumsfeld; and Harold Wool, Director for Procurement Policy, Office of the Assistant Secretary of Defense in Charge of Manpower. The papers submitted at the conference, as well as a transcript of the discussions at the conference, are reproduced in Tax, *The Draft* (U. of Chicago, 1967).

[62] This paper is reproduced in Tax, *supra,* pp. 221-251.

pay substantial implicit taxes because they were coerced to serve. A conservative estimate of the economic cost (excluding rents) is $826 million—the amount of compensation which would have induced these men to enter on a voluntary basis. If all recruits received the first-term pay needed to attract the last draftee, the opportunity cost of acquiring new accessions would exceed $5.3 billion.

"An all-volunteer force offers a polar alternative to the draft. With its lower personnel turnover, a voluntary force of the same size could be sustained by recruiting only 27.5 percent of qualified males. The budgetary payroll cost would, however, have to be raised by $4 billion per year.

"It should be emphasized that the figures appearing in this paper represent my estimates. The two crucial ingredients are (1) the supply curve of voluntary enlistments in the absence of a draft and (2) required accessions as determined by the assumed force strength and personnel turnover. Complement supply curves were estimated from cross-sectional data on estimated voluntary enlistment rates.

"The new retention profiles used to derive gross-flow demands for an all-volunteer force generated an age structure of the force which closely resembles those of smaller professional armies in Canada and the United Kingdom. In the light of the data examined, I am reasonably confident of my cost estimates, at least for the assumed force strength of 2.65 million men.

"If peacetime military requirements necessitate larger active-duty forces, all costs necessarily climb. In order to sustain a force strength of 3.3 million men on a voluntary basis, required accessions must be increased by roughly 30 percent. The additional budgetary cost of a voluntary force over a mixed force of

the same size would be in the neighborhood of 8 to 10 billion dollars. The high budgetary cost of a voluntary force is not the only relevant consideration. If men are procured by a draft, the high turnover of draftees implies that over 60 percent of qualified males would be demanded to maintain a mixed force of 3.3 million men. Annual accessions under a draft would rise by more than 50 percent of the mixed-force case.

"The alternative of a voluntary manpower procurement system has been criticized because of its inflexibility to changing military demands. If, for example, force strengths must be increased from 2.65 to 3.3 million men within a single year, it would be difficult to accomplish this through higher pay. The criticism is, in my opinion, valid for changing demands of this magnitude. However, a voluntary procurement system could be designed to accommodate minor fluctuations in stock demands—say from 2.65 to 3.0 million men. Entry level and career military pay could be set to provide excess supplies of enlistment applicants and servicemen who wish to reenlist. The number of men accepted (either as new recruits or as reenlistments) would be determined by the stock demand, meaning the force strength objective. In response to a short-run increase in strength objectives, the services would accept more of the excess supplies. The criticism of inflexibility is valid only if 'peacetime' military demands are so highly variable that they involve increasing force strengths by more than 10 percent in a single year.

"The defense budget for active-duty military personnel is obviously lower with a draft. *However, the conscription of military personnel simply substitutes implicit taxes levied on those men who serve for ex-*

plicit taxes on all citizens to finance the higher payroll of an all-volunteer force. The real economic cost of maintaining a defense establishment is partially concealed because these implicit taxes never appear in the defense budget. The real opportunity cost of acquiring military personnel must include the full economic cost of the draft."[63] (Emphasis added.)

Can it be thought constitutionally permissible to finance the cost of national defense by "implicit taxes" on the conscripted few as a substitute for explicit taxes on all citizens?

The 1967 Senate Hearings establish a range for the cost of an all-volunteer army, from nothing at all to $17 billion, with the most probable estimates narrowing the range to $4 to $8 billion, or a fraction of the defense budget and from 2% to 4% of the national budget. Does Congress have the power to finance space exploration, or development of ABM or MIRV or jumbo supersonic aircraft—at the expense of persons conscripted for the armed forces?

Nor is the problem attributable to a dearth of manpower. Indeed, as Burke Marshall, Chairman of the National Advisory Commission on Selective Service, testified, the problem is how to select 110,000 out of 730,000 available men.[64] Actually, the figure 730,000 is misleading, for the selection process begins long before that figure is reached: all males above the age of 26 are excluded from the available manpower pool, and all women regardless of age are excluded;[65] in 1968, of 20,829,000 registrants aged 18½ to 26, fully 5,189,000 were disqualified as physically or men-

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[63] *Id.*, pp. 246-247.

[64] Hearings, *op. cit.*, p. 126.

[65] Who Serves When Not All Serve, Report of the National Advisory Commission on Selective Service (Gov. Print. Off. 1967) suggests "the possibility of making more military positions available to women" (p. 11).

tally unfit; 4,126,000 were deferred on the basis of fatherhood or hardship; 2,200,000 had student deferments; 949,000 were enrolled in the National Guard, Reserves or ROTC; 471,000 had critical occupation or agricultural deferments; and 424,000 were "unclassified."[66] The random lottery selection process recently adopted, even if it be thought that the element of chance in selecting 110,000 from 730,000 is an improvement, does nothing to improve the arbitrary and capricious system which reduces the number in the pool down to 730,000, a system roundly condemned by the Marshall Commission report.[67] At least Monroe's 1814 subscription plan, discussed earlier in this brief, had the advantage of taxing every member in the national manpower pool, and did so at a time when the army's ranks were depleted and the treasury empty.

At the present time, the treasury is full and volunteers are available, but the government does not want to pay the additional cost. Why? Two answers appear from the 1967 Senate Hearings: first, it is claimed that an all-volunteer army is not sufficiently flexible, and second, a "mercenary" army is rejected as socially undesirable. On the matter of flexibility, Mr. Morris clarified the nature of the Act in his testimony before the Senate Committee on Armed Services:

> "Senator Stennis. Now is this bill written to cover conditions when we are at war or when we are at peace?
>
> "Mr. Morris. Both, sir. That is the great virtue of the present act . . . the great flexibility it has had. . . ."[68]

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[66] Statistical Abstract of the United States: 1969, *op. cit.*, p. 260, Table 383.

[67] Report of the National Advisory Commission on Selective Service, *op. cit.*

[68] Hearings, *op. cit.*, p. 89.

In short, the Act is designed to provide for emergencies. But as Burke Marshall testified, ". . . the view of those arguing for reliance on a voluntary force are really hypothesizing . . . standby authority for conscription in the event of any sudden national need." [69] It is one thing to enact a statute to be used in case of national emergency. It is quite another matter to use that statute in the absence of an emergency. So that there is no merit in the flexibility argument: according to Prof. Oi (see above quotation), a completely volunteer force could accommodate annual variations of 10% in manpower (and only once in the past ten years has an increase in manpower exceeded 10%—and then only in the Army, not the other branches of the armed forces. This occurred in 1965-1966); [70] in addition, Reserve and National Guard units may be called into active duty if the need arises; finally, the conscription statute need not be discarded—it can be used when the emergency occurs. This nation has repeatedly demonstrated its ability to mobilize large numbers of troops when the occasion required it. It can do so again.

As for the problem of an army composed of mercenaries, the danger arises not from the rank and file but from the officers, and the danger remains whether the ranks are filled by conscripts or by volunteers. The two safeguards suggested 180 years ago when the question of "standing armies" troubled the Framers of the Constitution are equally relevant today: keep the army small and the state militia well-trained.

The danger in permitting conscription to be used for ambiguous social ends, as opposed to raising an army in case of national emergency, is that it converts a nation where

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[69] Hearings, *op. cit.*, p. 125.

[70] Statistical Abstract of the United States: 1969, *op. cit.*, p. 256, Table 374.

peace and individual liberty are the norms into a nation obsessed with war mentality, it metamorphasizes Athens into Sparta. Nor is the parallel fanciful, as the following excerpts from the amazing Selective Service System "Channelling" memorandum, July 1, 1965 (Gov. Print. Off. 899-125) illustrates:

> "One of the major products of the Selective Service classification process is the channelling of manpower into many endeavors, occupations, and activities that are in the national interest. . . .
>
> "The opportunity to enhance the national well being by inducing more registrants to participate in fields which relate directly to the national interest came about as a consequence, soon after the close of the Korean episode, of the knowledge within the System that there was enough registrant personnel to allow stringent deferment practices employed during war time to be relaxed or tightened as the situation might require. Circumstances had become favorable to *induce registrants,* by the attraction of deferment, to matriculate in schools and pursue subjects in which there was beginning to be a national shortage of personnel. These were particularly in the engineering, scientific and teaching professions . . .
>
> "In the Selective Service System the term *'deferment'* has been used millions of times to describe the method and means used to attract to the kind of service considered to be most important, the individuals who were not compelled to do it. *The club* of induction has been used to drive out of areas considered to be less important to the areas of greater importance in which deferments were given, the individuals who did not or could not participate in activities which were considered to be essential to the defense of the Nation.

The Selective Service System anticipates further evolution in this area. . . .

"Since occupational deferments are granted for no more than *one year at a time,* a process of periodically receiving current information and repeated review assures that every deferred registrant continues to contribute to the overall national good. . . .

"In the less patriotic and more selfish individual it *engenders a sense of fear,* uncertainty, and dissatisfaction which motivates him, nevertheless, in the same direction. He complains of the *uncertainty* which he must endure; he would like to be able to do as he pleases; he would appreciate a certain future with no prospect of military service or civilian contribution, but he complies with the needs of the national health, safety, or interest—or is denied deferment.

"Throughout his career as a student, *the pressure*—the threat of loss of deferment—continues. It continues with equal intensity after graduation. . . .

"The device of *pressurized guidance,* or channelling, is employed on Standby Reservists. . . .

"If he attempts to enlist at 17 or 18 and is rejected, then he receives none of the *impulsion* the System is capable of giving him. If he . . . . is not rejected until . . . age 23, he has felt some of the pressure but thereafter is a free agent.

"This contributed to the establishment of a new classification of 1-Y (registrant qualified for military service only in time of war or national emergency). This classification reminds the registrant of his ultimate qualification to serve and preserves some of the benefit of what we call channelling. . . .

"From the individual's viewpoint, he is standing in a room which has been made *uncomfortably warm.*

> Several doors are open, but they all lead to various forms of recognized, patriotic service to the Nation. Some accept the alternative gladly—some with reluctance. The consequence is approximately the same.
>
> . . .
>
> "Delivery of manpower for induction, the process of providing a few thousand men with transportation to a reception center, is not much of an administrative or financial challenge. It is in dealing with the other millions of registrants that the System is heavily occupied, *developing more effective human beings in the national interest.*" (Emphasis added.)

"The club . . . fear . . . uncertainty . . . pressure" consciously used to "develop more effective human beings." Does it matter whether these human beings are also happy? No. "Some accept the alternative gladly—some with reluctance." It's all the same, as far as the "System" cares, so long as they comply.

Such a blatantly undemocratic "System" can be sanctioned under Congress's power to raise armies only if our nation is viewed as an armed camp, our people as so much war materiel to be marshalled in the "national interest." One is tempted to speculate whether the current rebellion of this country's youth is attributable to the unnatural pressures of this System.

But what is the constitutional mandate for this "arrogance of power"? Where is it written that the government may compel a young man to become an engineer or, if he prefers to become a teacher of literature or the arts, to compel him to become a soldier?[71] What if too many young men are "channelled" into engineering only to discover, af-

[71] Hearings, *op. cit.*, p. 114 set forth the then current list of "critical occupations."

ter investing many years of their lives, that some are not needed because there is a surplus of engineers? And, if needed, what of the frustrations and unhappiness of having been pressured into that occupation? Does not the "pursuit of happiness" presuppose the freedom to choose the direction of one's own life? To abridge freedom of choice when a young man is 18½ years old is to effectively deprive him of any meaningful choice, but of course it is precisely because the pressure is to be effective that the System applies it at that point.

Presumably, the statutory authority for the administrative scheme is section 1(e) of the Act which provides:

> "The Congress further declares that adequate provision for national security requires maximum effort in the fields of scientific research and development, and the fullest possible utilization of the Nation's technological, scientific, and other critical manpower resources."

This provision first appeared in the Selective Service Act of 1948. The Act, as the government conceded at the 1967 Senate Hearings, is designed for war. It should be restricted to that use. Military defense spending, exclusive of Southeast Asia, increased in each of the years 1965 through 1969. *In addition* to that budget, military defense outlays in Southeast Asia rose from $103,000 in 1965 to $29 billion in 1969 alone.[72] Financial ability is clearly not the obstacle to an all-volunteer force. No one in the government has suggested that there exists a state of national emergency. In the present circumstances, it is unwarranted and unconstitutional to apply the Act to conscript manpower instead of recruiting it from the labor market.

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[72] Statistical Abstract of the United States; 1969, *op. cit.*, p. 246, Table 357.

Reviewing the legislative and social history of the draft in the United States since 1940, one commentator concluded:

> "Thus in 1967 coercion was perfunctorily accepted and the argument from equality laid quietly to rest with the ghost of American voluntarism . . . At least for the moment, another ideal once central in American thought seemed of profound irrelevance." [73]

It may be true that in 1967 coercion was perfunctorily accepted by Congress. It is at least dubious that coercion was accepted, as a matter of principle, by the youth who are to be coerced.[74] And this Court should make it plain that it does not accept the "profound irrelevance" of the Constitution. This Court should declare unconstitutional the peacetime application of the Act.

2. The Act as administered is being used to "raise and support armies" for a war which violates both domestic and international law.

Long ago, this Court recognized the "high power," and duty, conferred upon it, of determining whether congressional and presidential acts "are beyond the *limits of power* marked out for them respectively by the constitution of the United States." (Emphasis added.) *Luther* v. *Borden*, 7 How. 1, 47. The vitality of that obligation has been re-

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[73] The history of conscription in this country since 1940 is traced in Gillam, The Peacetime Draft: Voluntarism to Coercion, Yale Review, vol. LVII, No. 4 (Summer 1968).

[74] The evil in permitting the continued existence of peacetime conscription is that, after a generation, it becomes the norm for older persons who themselves were subjected to its coercion. By thus isolating one segment of the people, the young, the government could, if permitted, systematically undermine every concept of individual liberty which the Constitution was intended to protect.

affirmed time and again. In the landmark decision *Ex parte Milligan*, 4 Wall. 2, this Court held:

> "*The Constitution of the United States is a law for rulers and people, equally in war and in peace*, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. *No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions be suspended during any of the great exigencies of government.*" 71 U.S. at 120, 121. (Emphasis added.).

More recently, this Court held in *United States* v. *Robel*, 389 U.S. 258:

> "*However, the phrase 'war power' cannot be invoked as a talismanic incantation* to support any exercise of congressional power which can be brought within its ambit. '[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.' *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U.S. 398, 426 . . . this concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. *Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart.* For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. *It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . .*" (Emphasis added.)

In *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, this Court declared unconstitutional the executive order of

President Truman authorizing seizure of the steel mills on the excuse that a strike would imperil national defense. The Court emphasized that the order could not be sustained either:

> "... as an exercise of the President's military power as Commander in Chief of the Armed Forces, ... or because of the several constitutional provisions that grant executive power to the President." 343 U.S. at 587.

In a concurring opinion, Mr. Justice Jackson elaborated:

> "What the power of command may include, I do not try to envision, but I think *it is not a military prerogative,* without support of law, *to seize persons or property because they are important or even essential for the military and naval establishment.*" 343 U.S. at 646.

Also writing a separate concurring opinion, Mr. Justice Frankfurter underlined the importance of judicial intervention:

> "The judiciary may, as this case proves, have to intervene in determining where authority lies as between the democratic forces in our scheme of government." 343 U.S. at 597.

The decision in *Reid* v. *Covert,* 354 U.S. 1, provides one more illustration of the dominance of law in our constitutional scheme. Cf. *Hamilton* v. *Kentucky Distilleries Co.* 251 U.S. 146, 156; *Powell* v. *McCormack,* 395 U.S. 486. And *Baker* v. *Carr,* 389 U.S. 186, 211, teaches that it is "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."

In light of the hallowed tradition of judicial review in our history, it is difficult to understand any justification for holding the legality of the Vietnam war to be a political question. What appellee seeks to establish is not error of judgment on political issues. He seeks to establish flagrant and outrageous violations of domestic and international law, ranging from the callous disregard for the doctrine of separation of powers as applied to the President and Congress, to egregious violations of binding treaties and rules of warfare. If there is to be any safeguard against "tyranny or disaster," the phrase used by the Senate Foreign Relations Committee, the immense military power wielded by the President must be matched by careful scrutiny to ensure its proper exercise.

Appellee's standing with respect to the legality of the Vietnam war has been discussed above. The argument of the government that appellee does not have standing is based on the possibility that he will not be ordered to Vietnam. But that argument ignores the substantial possibility that appellee *will* be shipped to Vietnam, and that possibility—coupled with the impossibility of obtaining meaningful judicial review [75]—if it materializes, certainly endows appellee with a sufficient "personal stake" in the question, within the meaning of that phrase as repeatedly used by this Court:

> "The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' *Baker* v. *Carr*, 369 U.S. 186, 204."

[75] See note, 83 Harv. L. Rev. 453, 462-464.

Flast v. *Cohen*, 392 U.S. 83, 99. Indeed, the prison term which menaces appellee in itself goes far towards inducing the "concrete adverseness" referred to by the Court.

Furthermore, the system prescribed by Congress avoids unnecessary disruption; the inductee is given one chance—his last chance—to refuse service, or to step forward and take a definitive oath of obedience. At this moment, the moment foreseen by Congress for judicial review, *see* 50 U.S.C. App. § 460 (b)(3), appellee asserted his constitutional right not to be drafted for service in an illegal war.

Thus, the issue of legality is justiciable and appellee has standing to litigate it.[76]

Discussion of the issue of legality will be divided into two segments: (1) United States participation in the Vietnam war is the result either of the President's usurpation of Congress's war powers, or of disregard of the constitutionally required separation of executive and legislative powers by both the President and Congress; (2) United States participation in the Vietnam war violates binding treaty obligations as well as international law.

The Undeclared War in Vietnam.

The President's unilateral commitment of the United States to war in Vietnam has received wide public attention. Some of the more useful essays analyzing the President's usurpation of Congress's war powers in the Vietnam case include Merlo J. Pusey, The Way we go to War (Houghton-Mifflin, 1969), and Francis D. Wormuth, The Vietnam War: The President versus the Constitution (Center for the Study of Democratic Institutions, Santa Barbara, California, 1968). Also helpful are Joseph C.

[76] See generally Velvel, *The War in Vietnam: Unconstitutional, Justiciable, and Jurisdictionally Attackable*, 16 Kan. L. Rev. 449 (1968).

Goulden, Truth is the First Casualty (Rand McNally, 1969)—analyzing in detail the Gulf of Tonkin incident, and Note, Congress, the President, and the Power to Commit Forces to Combat, 81 Harv. L. Rev. 1771 (1968). Most valuable of all are the transcript of hearings held by the Senate Foreign Relations Committee, August 16, 17, 21, 23 and September 19, 1967, on S. Res. 151, U.S. Commitments to Foreign Powers (Gov. Print. Off. 1967), and the report of the Senate Foreign Relations Committee based on those hearings, Calendar No. 118, Report No. 91-120, National Commitments (April 16, 1969). These last two documents will hereafter be referred to as "National Commitments Hearings" and "National Commitments Report" respectively.

The concluding paragraph of the National Commitments Report, p. 34, is an eloquent statement of the issue before this Court:

> "Already possessing vast powers over our country's foreign relations, the executive, *by acquiring the authority to commit the country to war,* now exercises something approaching absolute power over the life or death of every living American—to say nothing of millions of other people all over the world. There is no human being or group of human beings alive wise or competent enough to be entrusted with such vast power. Plenary powers in the hands of any man or group threaten all other men with tyranny or disaster. Recognizing the impossibility of assuring the wise exercise of power by any one man or institution, the American Constitution divided that power among many men and several institutions and, in so doing, limited the ability of any one to impose tyranny or disaster on the country. *The concentration in the hands of the President of virtually unlimited authority over matters of*

war and peace has all but removed the limits to executive power in the most important single area of our national life. Until they are restored the American people will be threatened with tyranny or disaster." (Emphasis added.)

One is reminded of another President, another war nearly two decades ago, also in Southeast Asia, when Mr. Justice Jackson warned:

> "Nothing in our Constitution is plainer than that declaration of a war is entrusted only to Congress. Of course, a state of war may in fact exist without a formal declaration. But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture."
>
> *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 642.

Sinister and alarming it certainly is, that the President has enlarged his dominance over the internal affairs of the country by committing our armed forces to Vietnam.

The analysis of what has happened and how it all happened is contained in the National Commitments Report, as supplemented by the National Commitments Hearings transcript. On August 16, 1967, Professor Ruhl Bartlett of the Fletcher School of Law and Diplomacy of Tufts University, testified:

> "The most important and the most obvious [conclusion] is that the positions of the executive and legis-

lative branches of the Federal Government in the area of foreign affairs have come very close to reversal since 1789, a change that has been gradual in some degree but with acceleration during the past half century and breakneck speed during the last 20 years. The President virtually determines foreign policy and decides on war and peace, and the Congress has acquiesced in or ignored, or approved and encouraged this development." [77]

Professor Bartlett then concluded:

". . . the greatest danger to democracy in the United States and to the freedom of its people and to their welfare—as far as foreign affairs are concerned—is the erosion of legislative authority and oversight and the growth of a vast pyramid of centralized power in the Executive branch of the Government . . . The arguments of immediacy, expertness, superior information, and greater wisdom are equally fallacious as bases for enlarged Presidential authority. The framers of the Constitution bequeathed to the American people a great heritage, that of a constitution, federal, representative government, with its *powers limited in scope and divided among its three separate branches,* and this system was devised *not because it would produce efficiency or world dominion, but because it offered the greatest hope of preventing tyranny.*" [78] (Emphasis added.)

On August 23, 1967, Senator Ervin testified:

"I have concluded that a distinction must be drawn between defensive warfare and offensive warfare.

[77] National Commitments Hearings, pp. 19-20.

[78] *Id.,* p. 21.

> There is no doubt whatsoever that the President has the authority under the Constitution and, indeed, the duty, to use the armed forces to repel sudden armed attacks on the Nation. *But any use of armed forces for any purpose not directly related to the defense of the United States against sudden armed aggression, and I emphasize the word 'sudden', can be undertaken only upon congressional authorization.*" (Emphasis added.)[79]

In a written statement to the Committee, Senator Dominick observed that, first, Senate review of Presidential appointments has become ineffective; second, Senate advice and consent to treaties has become perfunctory, and after the fact; third, the power to declare war has become irrelevant because of the President's assertion of inherent powers as Commander-in-Chief; and fourth,

> "The responsibility imposed upon Congress to raise and support armies has been seriously undermined for the reason that once the President has committed our Armed Forces into conflict Congress has no alternative but to provide for their effective support. . . . Since 1941, we have been involved in two major conflicts and numerous instances of American military personnel being sent into hostile areas without prior consultation with Congress. The most recent of such incidents occurred last month and involved our sending C-130 jet aircraft into the Congo. There is serious room to question whether this action could be justified under the constitutional authority of the President, as Commander-in-chief, to order American military personnel to foreign soil to repel attack, protect the lives and property of U.S. citizens, or to fulfill United States Treaty obligations."[80]

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[79] *Id.*, p. 194.

[80] *Id.*, pp. 236-237.

Congressman Findley submitted a statement in which he analyzed the provisions of the SEATO treaty of 1954, together with its legislative history including testimony by John Foster Dulles before the then Senate Foreign Relations Committee, and concluded that the provisions of the treaty had not been complied with in connection with Vietnam.[81]

On behalf of the administration, Under Secretary Nicholas deB. Katzenbach testified that declarations of war are outmoded,[82] thereby echoing Hamilton's identical pronouncement 180 years earlier.[83] Then he asserted that the SEATO treaty when considered together with the Tonkin Gulf resolution amounted to the "functional equivalent" of a declaration of war. At that point, the Chairman of the Committee interjected:

> "They did not ask for a declaration of war. They do not have one yet.
>
> "Mr. Katzenbach. That is true in the very literal sense of the word.
>
> "The Chairman. It is quite true, not only literally, but in spirit. You haven't requested and you don't intend to request a declaration of war, as I understand it."[84]

Subsequently in his testimony, Mr. Katzenbach conceded that the Tonkin Gulf resolution had not been based upon the SEATO treaty at all because, at the time it was requested

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[81] *Id.*, p. 230.

[82] *Id.*, p. 81.

[83] "As the ceremony of a formal denunciation of war has of late fallen into disuse . . .", The Federalist, Number 25.

[84] National Commitments Hearings, p. 82.

by the President, there was no evidence of invasion by North Vietnam into South Vietnam.[85]

In the course of colloquy with Mr. Katzenbach, Senator Fullbright indicated that he had viewed the Tonkin Gulf resolution as involving a very limited response to a temporary attack ". . . as opposed to a full-fledged war like the one which we are in"; that the resolution had been drafted by the Executive, not by Congress; and that the resolution had been adopted in the heat of the moment ". . . largely without any consideration."[86] Senator Gore confirmed that he had never understood the resolution as amounting to a decision for war:

> "I did not vote for the resolution with any understanding that it was tantamount to a declaration of war."[87]

Senator Gore then established that, as the administration interpreted the Tonkin Gulf resolution, it had a blank check to do whatever it thought necessary, despite the absence of any meaningful consideration by Congress:

> "Senator Gore. You have confirmed that Congress would have had great difficulty foreseeing the bombing of North Vietnam. I would have had difficulty foreseeing the commitment of ground troops, combat troops, particularly in view of the repeated statements of President Johnson in contravention of such a policy. But if the Congress would have had difficulty foreseeing the bombing of targets within 10 miles of China, as I say and as you now confirm, do you not think it incumbent upon the President to seek the advice and consent of the Congress before undertaking such action?

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[85] *Id.*, p. 87.

[86] *Id.*, pp. 82-83.

[87] *Id.*, p. 88.

"Mr. Katzenbach. No; I do not, Senator. . . ."[88]

Thereafter, Senator Cooper, having established with Mr. Katzenbach that the first section of the Tonkin Gulf resolution—approving any action taken to repel an attack on United States Forces—added nothing to the power which the President already had in that respect, turned to the second section:

> "Senator Cooper. The second section granted broad powers. It did give to him the authority to take any necessary steps that he thought proper, including the use of armed forces, to resist aggression against South Vietnam. I did raise the question on the floor that day that *we were not under the SEATO treaty authorizing President Johnson in advance to engage our forces in South Vietnam and to attack ports and cities in North Vietnam.*" (Emphasis added.)[89]

In fact, Senator Cooper conceived the problem to have occurred long before the Tonkin Gulf incident, when without congressional authorization, President Kennedy had committed 14,000 troops to Vietnam in 1962, and President Johnson had increased the number to 25,000 in 1964. His concern was that, step-by-step, the President on his own had moved the United States to within 10 miles of war with China.[90]

Senator Percy was the next witness, and he suggested a procedure requiring the President to itemize, on an annual basis, each foreign commitment sought to be financed:

> "1. It would require the President to distinguish between commitments of economic assistance and military commitments including armed intervention, thus clarifying the policy of his administration . . .

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[88] *Id.*, pp. 93-94.

[89] *Id.*, p. 107.

[90] *Id.*, p. 108.

"2. It would enable the Congress, and particularly the Senate, to express itself on the validity of commitments before they are extended and especially before any of them are implemented by force. . . ."[91]

This, of course, is the complete answer to any suggestion that appropriations by Congress, without itemization, amount to ratification of military decisions taken by the President. Cf. *Ex parte Endo*, 323 U.S. 283. This is a consideration apart from the practical point made by Senator Dominick (quoted above), ". . . once the President has committed our Armed Forces into conflict Congress has no alternative but to provide for their effective support."

The Committee Report itself carefully traces the historical development of Congress's war powers, noting that the framers had vested these powers in Congress and (quoting Hamilton) that the President was little more than a "supreme" commander of the army and navy.[92] The report then underscores the adherence of the early Presidents to the allocation of power incorporated in the Constitution, and traces the history of the ever-growing assertion of Executive power which reaches its crescendo in the past twenty years.[93] The report considers at some length President Truman's commitment of troops in Korea without obtaining prior Congressional approval, and notes the impatience demonstrated by Secretary of State Acheson with the constitutional question of separation of powers:

"We are in a position in the world today where the argument as to who has the power to do this, that, or the other thing, is not exactly what is called for from America in this very critical hour."[94]

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[91] *Id.*, pp. 112-113.

[92] National Commitments Report, pp. 7-11.

[93] *Id.*, pp. 10-15.

[94] *Id.*, pp. 17-19.

Then the report focuses upon the Tonkin Gulf resolution:

> "In the case of the Gulf of Tonkin resolution, the Senate responded to the administration's contention that the effect of the resolution would be lost if it were not enacted quickly. *The desired effect was a resounding expression of national unity and support for the President at a moment when it was felt that the country had been attacked . . . [T]herefore . . . the exact words in which it expressed those sentiments were not of primary importance. . . .* When Congress declared war on Japan on December 8, 1941, it expected that the full military power of the United States would be brought to bear against Japan. When Congress adopted the Gulf of Tonkin resolution, it had no such expectation. Its expectations were shaped by events outside of the formal legislative record, notably the national election campaign then in progress, in which President Johnson's basic position as to Vietnam was expressed in his assertion that '*. . . we are not about to send American boys 9,000 or 10,000 miles away from home to do what Asian boys ought to be doing for themselves.*' It is difficult, therefore, to credit Under Secretary of State Katzenbach's contention that the Gulf treaty, was the 'functional equivalent'' of a declaration of war.''[95] (Emphasis added).

The report also notes that President Johnson subsequently said that the Tonkin Gulf resolution was not "... necessary to what we did and what we're doing."[96] After reviewing America's far-flung commitments through treaties and executive agreements,[97] the report concludes with a plea for restoration of the constitutional balance.[98]

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[95] *Id.*, pp. 22-23.

[96] *Id.*, p. 24.

[97] *Id.*, pp. 26-30.

[98] *Id.*, pp. 30-32.

As an ominous footnote to the report, a letter from the Department of State—commenting on the proposed Senate resolution on foreign commitments, asserts, "In any event, a resolution could not change the constitutional powers of the President."[99]

Plainly, the Tonkin Gulf resolution does not amount to congressional authorization of the Vietnam war. Dr. Albert Levitt, an authority on constitutional law, testified before the Committee:

> "The Tonkin Bay Resolution does not purport to give, and does not give, any power or authority . . . Whatever it may mean, it cannot possibly mean that Congress has abdicated and given all its powers over the armed forces of the United States to the President and that the Congress is prepared to do whatever the President tells it to do."[100]

If Dr. Levitt is wrong, then it is equally plain that the resolution is an unconstitutional delegation of Congress's power to the President. *Panama Refining Co.* v. *Ryan,* 293 U.S. 388; *A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495.

Early in the history of this Court, in *Bas* v. *Tingy,* 4 Dall. 37, the power of Congress to authorize a limited war as well as to declare a general war was recognized. The several opinions, written by Justices Washington, Chase and Patterson are unanimous on this question. Chief Justice Marshall later confirmed the constitutional allocation of powers, writing for the Court in *Talbot* v. *Seeman,* 1 Cranch, 1, "The whole powers of war being, by the Constitution of the United States, vested in Congress, the acts of that body can alone be resorted to as our guides . . . Congress

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[99] *Id.,* p. 35.

[100] National Commitments Hearings, *op. cit.,* p. 282.

may authorize general hostilities . . . or partial hostilities . . .'' 1 Cranch, 1, 28. See also *Little* v. *Barrene,* 2 Cranch, 170.

The Constitution has not been amended in this particular since 1800 when *Bas* v. *Tingy* and *Talbot* v. *Seeman* were decided, obsolete though the government may view its provisions to be. The time has come for this Court to restore constitutional government in our country, to reaffirm the exclusive power of Congress in the initiation of war, and to declare that the Vietnam war was initiated and is being pursued in total disregard of constitutional requirements.

Treaties and International Law.

An exhaustive canvass of international law as it bears on the Vietnam war is obviously not feasible in this brief. Basically, appellee relies on and adopts the arguments in John H. E. Fried, Rapporteur, Vietnam and International Law: The Illegality of United States Military Involvement (O'Hare Books, 1967), which was admitted into evidence at appellee's trial below for the limited purpose of establishing the reasonableness of his belief that the Vietnam war is illegal. The major conclusions reached by the distinguished group comprising the ''Consultative Council Lawyers Committee on American Policy Towards Vietnam'' are set forth in the record (A. pp. 18-19). See generally Richard A. Falk, Ed., The Vietnam War and International Law (Princeton 1968).

A convenient beginning framework for the present analysis is provided by a Memorandum from the Department of State, Office of the Legal Adviser, dated March 4, 1966, entitled The Legality of United States Participation in the Defense of Viet-Nam, which is printed in the Congressional Record for March 10, 1966, 112 Cong. Rec. 5274-5279. This

document will hereafter be referred to as the "State Department Memorandum."

The State Department Memorandum is divided into four principal arguments, and a conclusion. The fourth argument is entitled "The President has Full Authority to Commit United States Forces in the Collective Defense of South Vietnam," and argues:

> "*The grant of authority to the President in article II of the Constitution extends to the actions of the United States currently undertaken in Vietnam.* In fact, however, it is unnecessary to determine whether this grant standing alone is sufficient to authorize the actions taken in Vietnam. These actions rest not only on the exercise of Presidential powers under article II but on the SEATO treaty—a treaty advised and consented to by the Senate—and on actions of the Congress, particularly the joint resolution of August 10, 1964. (Emphasis added.)

The Memorandum's argument that the President's power under Article II to "repel sudden attacks" extends to attacks on South Vietnam is founded on a blatant distortion of history.[101] Reliance on the Tonkin Gulf resolution is un-

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[101] The State Department Memorandum states that the views of the early Presidents in our nation's history ". . . are highly persuasive evidence as to the meaning and effect of the Constitution," but distorts that history in suggesting, for instance, that the "undeclared war" with France (1798-1800) was conducted without congressional authorization. Wormuth, *op. cit.*, pp. 4, 6-10, observes, "It would be difficult to find a bolder or more childish attempt at deception," and cites at least 7 separate acts of Congress specifically directed at the undeclared war with France, and the decision in *Bas* v. *Tingy, supra,* where the Supreme Court *held* that Congress had authorized the limited war against France. Adherence by Presidents Jefferson and Madison to the Constitution's exclusive grant to Congress over the decision to take the nation from a state of peace to a state of war is described by Wormuth, *supra,* at pp. 9-10.

justified for reasons already expressed above,[102] as well as other reasons which cannot be discussed within the space

[102] The memorandum itself supports the above description of the Tonkin Gulf resolution as an expression of sentiment rather than an authorization to commit ½ million ground troops to Vietnam. It quotes Senator Nelson's proposed amendment to the resolution, that Congress approves the

> "... President's declaration that the United States, seeking no extension of the present military conflict, will respond to provocation in a manner that is 'limited and fitting'. *Our continuing policy is to limit our role to the provision of aid, training assistance, and military advice,* and it is the sense of Congress that, except when provoked to a greater response, we should continue to attempt to avoid a direct military involvement in the Southeast Asia conflict." (Emphasis supplied.)

The memorandum also quotes the response of Senator Fullbright to this proposed amendment,

> "The Senator has put into his amendment a statement of policy that is unobjectionable. However . . . the House is now voting on this resolution . . . I cannot accept the amendment and go to conference with it, and thus take responsibility for delaying matters. . . . I regret that I cannot do it, even though *I do not at all disagree with the amendment* as a general statement of policy." (Emphasis added.)

In the course of hearings before the Senate Preparedness Investigating Subcommittee, Senator Stennis told Secretary Rusk:

> "I really do not think we need a legal adviser to tell us what the Tonkin Gulf Resolution means or what the Constitution means when it talks about declaring war . . . It seems to me that you stand on mighty thin ice if you rely upon the Tonkin Gulf Resolution as a constitutional basis for this war."

Preparedness Investigating Subcommittee of the Senate Armed Services Committee, Worldwide Military Commitments, Part I, Hearings, August 1966, p. 68.

limitations of this brief.[103] The SEATO treaty, 6 U.S. Treaties 81, TIAS No. 3170 (1955), does not provide a basis for the United States participation in the Vietnam war.

Before turning to Article IV, paragraph 1 of the SEATO treaty, which is the provision relied upon by the government, it is important to emphasize that the treaty was not intended to alter the obligations imposed by the United Nations Charter. Article VI of the treaty makes this clear:

> "The Treaty does not affect and shall not be interpreted as affecting in any way the rights and obligations of any of the Parties under the Charter of the United Nations or the responsibility of the United Nations for the maintenance of international peace and security."

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[103] The circumstances surrounding the purported attacks by North Vietnamese torpedo gunboats against the Maddox and Turner Joy, which were not revealed to the Senate at the time the President asked for the Resolution, are analyzed in detail in Goulden, Truth is the First Casualty, 1969; see chapters 5 and 8, in particular, which indicate that the commander of the vessels, Commander Herrick, had sent a telegram indicating that the attacks perhaps did not occur ("... Review of action makes many reported contacts of torpedoes fired appear doubtful . . . Freak weather effects and overeager sonarman may have accounted for many reports. No actual sightings by Maddox. Suggest complete evaluation before any further action," p. 152); that the American ships had for several days operated within the 12 mile territorial waters limit claimed by North Vietnam, p. 227; that the American vessel was an electronic "spy" vessel equipped with radar capable of simulating an attack against North Vietnam for the purpose of evoking—and analyzing—the North Vietnamese response; that South Vietnam was simultaneously conducting so-called "De Soto" patrols with gunboats bombarding North Vietnam—in the immediate vicinity of the American vessels—as Senator Morse stated to Secretary Rusk: "The fact that you were electronically invading . . . North Vietnam, while at the same time . . . the South Vietnamese boats were going in to make their attack, puts us . . . where the North Vietnamese . . . would see some interrelation." (P. 223.)

The State Department Memorandum, moreover, expressly relies on the supremacy clause of the Constitution to establish that SEATO is the supreme law of the land: "Under Article VI of the United States Constitution, 'all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.'" The same logic leads to the unavoidable conclusion that, by the SEATO treaty, the overriding "obligations" of the United States under the United Nations Charter were reconfirmed.

Article IV of the treaty provides in pertinent part:

> "1. Each Party recognizes that aggression by means of *armed attack* in the treaty area against any of the Parties or against any State or territory which the Parties by unanimous agreement may hereafter designate, would endanger its own peace and safety, and agrees that it will in that event act to meet the common danger *in accordance with its constitutional processes.* Measures taken under this paragraph shall be immediately reported to the Security Council of the United Nations.
>
> "2. If, in the opinion of any of the Parties, the inviolability or the integrity of the territory or the sovereignty or political independence of any Party in the treaty area or of any other State or territory to which the provisions of paragraph 1 of this Article from time to time apply is threatened in any way other than by armed attack or is affected or threatened by any fact or situation which might endanger the peace of the area, the Parties *shall consult immediately in order to agree* on the measures which should be taken for the common defense." (Emphasis added.)

The Parties to the Treaty were Australia, France, New Zealand, Pakistan, the Republic of the Philippines, the King-

dom of Thailand, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. As designated, the treaty area includes the States of Cambodia and Laos, and the territory under the jurisdiction of the "State of Vietnam."

Now, much has been written about the technical meaning of the phrase "armed attack," and whether, as defined, it brings to life paragraph 1 of Article IV, rather than paragraph 2—which requires unanimous agreement by the Parties to the Treaty as to measures to be taken. In part, the question is related to an accommodation with the provisions of the Charter of the United Nations, 59 Stat. 1031, particularly Article 2(4) which prohibits the threat or use of force in a manner inconsistent with the purposes of the United Nations, Articles 39, 42 and 44 which designate the Security Council as the body charged with responsibility for determining the existence of an act of aggression and for deciding appropriate measures to be taken in response, including military sanctions, and Article 51, which provides:

> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an *armed attack* occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security." (Emphasis added.)

The nature and timing of the supposed armed attack claimed by the government to have triggered the collective self-defense mechanism was described in testimony by former Secretary of State Rusk on January 28, 1966, before the Senate Foreign Relations Committee: [104]

> "From November of 1964 until January of 1965 they moved the 325th Division of the North Vietnamese

[104] The transcript of these hearings is reproduced in Fulbright, *The Vietnam Hearings* (Vintage 1966), and page references will be to this book.

> Army down to South Vietnam. There was no bombing at this time. Now, this is an aggression by means of an armed attack."[105]

Secretary Rusk's definition of the phrase "armed attack" does not conform with the definition given by eminent authorities that, consistent with the objective of Article 51, *supra*, the discretion of a state to claim self-defense is confined to instances when the necessity of action is "instant, overwhelming, and leaving no choice of means, and no moment for deliberation." Jessup, A Modern Law of Nations, 163-164 (1948); Kelsen, Law of the United Nations, 798-800 (1950). Even if taken to be true,[106] Rusk's statement fails to take adequate account of United States troop build-up in July of 1964 together with the illegal[107] reprisal attack which destroyed the North Vietnamese navy (thereby incapacitating North Vietnam from intercepting the South Vietnamese "De Soto" patrols, see above n. 103) as well as its oil storage depot at Vinh.[108] In summary, the action of the North Vietnamese cannot properly be described as amounting to "armed attack," as opposed to the lesser form of aggression or interference contemplated by paragraph 2 of Article IV of the SEATO treaty.

An entirely separate question, involved in determining whether the phrase "armed attack" is at all applicable, is whether the Vietnam war is in reality a civil war, as opposed to an invasion by North into South Vietnam. The

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[105] *Id.*, p. 44.

[106] Cf. Report submitted by Senator Mansfield to the Senate Foreign Relations Committee on January 6, 1966, entitled "The Vietnam Conflict: The Substance and the Shadow."

[107] See e.g. on illegality of retaliatory attacks, Higgins, R., The Development of International Law through the Political Organs of the United Nations, 217 (1963).

[108] For an account of the chronology of the retaliatory attacks, see Goulden, *supra*, 42-43, 233-235.

demarcation line between North and South is strictly ". . . provisional and should not in any way be interpreted as constituting a political or territorial boundary." [109] Indeed, part III, D, of the State Department Memorandum undertakes to prove that "South Vietnam was justified in refusing to implement the election provisions of the Geneva Accords" on the ground that elections would not have been "free." In 1966, Senator Fulbright responded to Secretary Rusk's explanation about prospects for free elections having been poor in 1955 by quipping, "Now, they have always been poor, and will be for a hundred years, won't they? That was no news to you. I mean, this was a device to get around the settlement, was it not?" [110] But the character of the war as a civil war was most convincingly demonstrated by Senator Aiken—on the basis of the Department of Defense's own statistics:

> "According to the Department of Defense statistics, there have been a total of 63,300 infiltrators [armed and unarmed] from North Vietnam since 1960, and during that period, again according to the Department of Defense, we have killed 112,000 Viet Cong. The year-end strength of the Viet Cong was 225,000 excluding the North Vietnamese troops. It makes a total of 337,000 Viet Cong including those killed in action. Now, if you subtract that from the total of 63,300 infiltrators from the North, that still leaves 273,700 Viet Cong recruited and trained in the South, according to the Department of Defense statements. Does this indicate that there are civil war aspects to this struggle, and

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[109] Paragraph 6 of the Final Declaration of the Geneva Conference on the Problem of Restoring Peace in Indo-China, 161 Brit. & For. State Papers 359 (1954).

[110] Fulbright, *op. cit.*, p. 40.

that the appeal of the Vietcong to his fellow countrymen in South Vietnam is quite strong?" [111]

If there remains any considerable doubt that an "armed attack" did not occur within the meaning of Article 51 of the United Nations Charter, it might be appropriate to remand the case for determinations of fact on these questions, for the interpretation of treaty provisions is a function which ultimately can only be performed by this Court—on the basis of an adequate record, of course.

But assuming, *arguendo,* that an armed attack did occur, it is certain that the obligation of the government to act (in the language of the SEATO treaty's Article IV. 1. ". . . in accordance with its constitutional processes") was not observed:

"Gore: . . . Going back to the SEATO Treaty, where are the constitutional processes with respect to the United States that we agreed to follow in SEATO?

"Rusk: The processes which have been determined through consultation between the President and the leadership, for example, such processes as the resolution of the Congress of August, 1964." [112]

And so the quest for justification of the Vietnam war, under outstanding treaty obligations, comes full circle back to the sufficiency of the Tonkin Gulf resolution as congressional authorization for the war. In 1954, in testifying before the Senate Foreign Relations Committee, Secretary of State John Foster Dulles denied that the SEATO treaty obligated the United States to intervene in the event of communist subversion in Vietnam, ". . . we have no undertaking to put it down; all we have is an undertaking to consult together as to what to do about it." [112] Noteworthy is the

[111] *Id.,* p. 260.

[112] Foreign Commitments Report, *supra,* p. 28.

fact that Article IV. 1. of the SEATO treaty provides that armed attack in the treaty area would "endanger the peace and safety" of each party, whereas, by contrast, the NATO treaty of April 4, 1949 (ratified July 25, 1949) provides in Article 5,

> "The Parties agree that an *armed attack* against one or more of them in Europe or North America *shall be considered an attack* against them all; and consequently they agree that, if such an armed attack occurs, each of them . . . *will* assist the Party or Parties so attacked by taking forthwith . . . such action as it deems necessary, including the use of armed force. . . ." (Emphasis added.)

The difference in language is not accidental and underscores Dulles' characterization of the SEATO treaty obligation as involving nothing more than consultation—and action within the channels established by the United Nations. Hypothesizing a refusal to act by the Security Council in the present circumstances would provide no greater justification for resort to use of force than would the refusal of Congress to declare war justify the President in taking the matter into his own hands.[113]

But the most shocking aspects of the Vietnam war, its ultimate illegality, transcends the narrow confines of treaties providing for the use of force, for it is a war of genocide within the meaning of the United Nations General Assembly Resolution 260 (III), which extends the concept of genocide to destruction of part of an ethnic group. Lemkin, "Genocide as a Crime under International Law," 41

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[113] But Secretary Rusk once testified, "No would-be aggressor should suppose that the absence of a defense treaty, congressional declaration, or U.S. military presence grants immunity to aggression." *Ibid.*, p. 47.

American Journal of International Law 145 (1947). Early in 1966, perhaps before it was too late, George F. Kennan testified before the Senate Foreign Relations Committee,

> "Our motives are widely misinterpreted, and the spectacle—the spectacle emphasized and reproduced in thousands of press photographs and stories that appear in the press of the world, the spectacle of Americans inflicting grievous injury on the lives of a poor and helpless people, and particularly a people of different race and color. . . ."[114]

Since Mr. Kennan's testimony, phrases like "Operation Phoenix," "scorched earth," and "Song My" have become a familiar, shameful part of our vocabulary.

Following are selections from the book In the Name of America, Clergy and Laymen Concerned About Vietnam, 1968, which compiles newspaper reports in an effort to establish countless violations of the rules of warfare:

On "Defoliation and Crop Destruction," pp. 283-304. From the New York Post, November 13, 1967, Thomas O'Toole, Washington:

> "Two of the nation's foremost biologists have charged that the United States is waging chemical warfare in Vietnam that is not only a tactical failure but may also be poisoning Vietnamese plant and animal life for years to come.
>
> "Spraying chemicals on rice crops believed to be in Vietcong hands, charge the two men in the current issue of 'Scientist and Citizen,' has not caused suffering and starvation in Vietcong ranks. What it has done, the two men insist, is to trigger a shortage of food for innocent women, children, infirm and aged Vietnamese.
>
> "At the same time, writes Dr. Arthur Galston, president of the Botanical Society of America and Dr. Jean

[114] Quoted in Fulbright, *supra*, p. 112.

Mayer, professor of nutrition at Harvard University, the spraying of herbicides to defoliate the countryside has apparently failed to expose the Vietcong trails and hideaways. Instead, claim the two men, the spraying has resulted in widespread damage to fruit and rubber trees, spinach and bean crops.

"The herbicides have also leaked into Vietnamese streams and rivers, Dr. Galston said, and 'while they may not be directly toxic to fish they may prove toxic' by killing the microscopic animals fish feed on.

". . . Of particular concern to biologists, writes Dr. Galston, is the apparent escalation of the defoliation and crop spraying program. This year, Dr. Galston said, 'Plans were to spray 1,500,000 acres, with as much as 500,000 acres being crop land'—about 5% of South Vietnam's 8 million acres under cultivation.

"So huge is the spraying operation in Vietnam now, Dr. Galston said, that military demand for the herbicides used is four times what can be produced by U.S. chemical companies one of the largest being Dow Chemical Co."

On "Forced Transfer" of entire villages, pp. 305-341. From the New York Times, January 11, 1967, BENSUC, South Vietnam, January 8:

"For years this quiet, ill-kept village hugging an elbow of the Saigon River 30 miles northwest of the capital has been a haven for the Vietcong.

"One pacification program after another has failed here and, since a Government military post was abandoned more than a year ago, Bensuc has been considered a 'hostile' village. It has been an embarrassing problem for Saigon.

"This morning, 600 allied soldiers—mostly Americans—descended on the village and began 'solving' the problem.

"Within two weeks, the more than 3,800 residents of Bensuc will be living in a new refugee settlement 20 miles to the southeast . . .

". . . Then came a second message telling men, women and children: 'Go immediately to the schoolhouse. Anyone who does not go to the schoolhouse will be considered a V.C. and treated accordingly.'"

On "Refugees," pp. 343-367. From New York Times, Sept. 5, 1966, Charles Mohr, Saigon, South Vietnam, Sept. 4:

". . . Perhaps the worst case of all is that of payment to more than a million war refugees. When the program began, a refugee got 7 cents a day subsistence for 30 days and then about $35 to "resettle."

"After more than a year, the only improvement is that the refugee gets 10 cents instead of 7 cents for the first 30 days.

"One informed source said: 'Everybody knows that refugee payments are too low, but nothing is done about it because the Vietnamese Government doesn't want to raise them and we don't want to make an issue out of it. We turn our head."

From the New York Times, October 28, 1967, Tom Buckley, Saigon, October 27:

". . . The removal of familiar village rituals, the lack of meaningful work and the absence, in many cases, of their fathers are believed to be having a harmful effect on the children, who make up perhaps two-thirds of the nearly 800,000 persons who are officially stated to be in camps and other temporary habitations . . .

". . . as the children approach their teens the 'excitements' become a growing fascination with racketeering, petty theft and in the case of girls, prostitution . . .

"Land in secure areas suitable for growing rice, the staple of the Vietnamese diet, is at a premium. None is available for generally penniless refugees."

On "Civilian War Victims," pp. 369-384. From New York Times, May 8, 1967, Neil Sheehan, Washington, May 7:

"Senator Edward M. Kennedy asserted today that war casualties among South Vietnamese civilians were occurring at a rate of more than 100,000 a year . . .

"Maj. Gen. James W. Humphreys, director of the aid mission's Office of Public Health in Saigon, has estimated that 50% of the civilian casualties are caused by allied military action and 50 per cent by the enemy. Other experienced officials suggest that a majority are victims of allied military activity."

Chandler Brossard in the April 18, 1967, issue of Look Magazine, reports that 1,000,000 children have been wounded in the war, and that more than 250,000 have been killed.

On "Prisoners of War and the Wounded in the Field," pp. 55-90. From New York Times, September 30, 1965, Neil Sheehan, Saigon:

". . . Vietnamese Army police and paramilitary organizations such as the national guard and the militia shoot Vietcong captives out of hand, beat or brutally torture them or otherwise mistreat them . . .

"The favorite methods of torture used by the Government troops are to slowly beat a captive, drag him behind a moving vehicle, apply electrodes to sensi-

tive parts of his body or block his mouth while water spiced with hot pepper is poured down his nostrils."

From New York Herald Tribune, Beverly Deepe, Saigon, April 25, 1965:

"In one kown case, two Viet Cong prisoners were interrogated on an airplane flying toward Saigon. The first refused to answer questions and was thrown out of the airplane at 3,000 feet. The second immediately answered all the questions. But he, too, was thrown out. . . . One of the most infamous methods of torture used by the government forces is partial electrocution —or 'frying' as one U.S. advisor called it.

"This correspondent was present on one occasion when the torture was employed. Two wires were attached to the thumbs of a Vietcong prisoner. At the other end of the strings was a field generator, cranked by a Vietnamese private. The mechanism produces an electrical current that burned and shocked the prisoner.

"Vietnamese officers report that sometimes the wires are attached to the male genital organs, or to the breasts of a Vietcong woman prisoner.

"The water torture, also used by government forces, is painful but seldom fatal. One person forces the prisoner to gulp water, while another applies pressure on his stomach. This forces the water out and creates a feeling similar to drowning.

"Other techniques, usually designed to force onlooking prisoners to talk, involve cutting off the fingers, ears, fingernails or sexual organs of another prisoner. Sometimes a string of ears decorate the wall of a government military installation. One American installation has a Viet Cong ear preserved in alcohol."

On "Civilians, Suspects and Combatants," pp. 91-116. From New York Times, May 7, 1966, Saigon:

> "Some of the 31 prisoners captured said they had been instructed to pretend they were Vietnamese farmers, the spokesman said.
>
> "That's why we took so many Vietcong suspects—389 of them," said an officer. "We went around to all the fields and picked up the people working the edges of the fields. Probably a high percentage of the people we picked up will turn out to be Vietcong who were playing farmer."

From New York Times, March 3, 1967, Saigon:

> ". . . In an operation that the First Cavalry Division (Airmobile) has been conducting in Bindinh Province, an enemy platoon was ambushed, with 10 killed. A total of 392 guerrillas have been reported killed and 2,699 suspects held for investigation since the operation began, on Feb. 12."

On "Use of Gas," pp. 117-230. From New York Times, January 4, 1966, Saigon:

> "The spokesman emphasized that this was not the first time that gas had been employed in such a manner. In fact, United States troops have used it a number of times in various ways since Gen. William C. Westmoreland, the United States Commander in Vietnam, authorized its use in October."

On "Destroying Huts and Villages," pp. 131-152. From New York Times, September 16, 1965, Chales Molfr, Camne, South Vietnam, September 15:

". . . In early August, a Marine battalion burned perhaps 500 houses in the embarassing presence of a television camera crew.

". . . Around them is some evidence that the war is hard for the Vietcong too. Although Defense Department spokesmen had criticized the Columbia Broadcasting System for saying that 150 were burned in Camne, marines and Vietnamese officials insist that the correct figure was 500."

On "Scorched Earth," pp. 143-152. From New York Herald Tribune, May 23, 1965, Saigon:

". . . Near the big coastal city of Hue, U.S. Marines moved out on Friday from their defensive positions around Phu Bai air base and swept through Viet Cong dominated villages eight miles to the west. The Marines set crops on fire and burned or dynamited huts in a scorched-earth operation."

On "Aerial Bombardment in South Vietnam," pp. 173-268. From New York Times, section 4, November 7, 1965:

". . . The air operation in South Vietnam alone is enormous. During October, pilots of the U.S. Air Force flew nearly 10,000 sorties. Giant B-52's, flying from Guam, bombed areas which Government troops never have been able to penetrate. In addition, other planes struck daily at military and supply targets in North Vietnam.

"The main problem with the bombing is that it inevitably results in civilian casualties in villages where the guerrillas hide. Sometimes the casualties are accidental; in one of the worst accidents, 48 South Vietnamese civilians were killed last week in the bombing of a village mistakenly believed to be controlled by the Vietcong."

On "Weapons," pp. 269-282. From New York Times, February 21, 1967, William Beecher, Washington:

> ". . . In a typical bombing mission against North Vietnam, some planes will carry Shrikes to try to silence the radar surface-to-air missiles and antiaircraft guns and some planes will carry antipersonnel cluster bombs and other weapons designed to kill those who man the air defense weapons."

The above examples are typical. They are not selected for their sensationalistic character, and the list could go on indefinitely.*

Two questions arise as to the relevance of this information: first, is it accurate—that, again, is a matter to be determined at a trial designed to answer the question, if that is thought necessary; second, is it a conscious decision on the part of those persons responsible for planning the conduct of the war—the answer to that question can be inferred from the scale of devastation, the level of physical punishment being inflicted on Vietnam. It seems inconceivable that the physical destruction of that country, the disruption of its society, the uprooting of its peoples, the sheer killing and suffering imposed on the civilian population—particularly women and children, the breaking down of traditional values, it seems inconceivable that all of this can be justified on any ground. The richest, most powerful and technologically advanced nation in the history of the world is tearing apart a small, helpless, backward, agricultural country whose wretched peoples have been subjected to war by Westerners for a generation.

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*See e.g. Duffet (Ed.) *Against the Crime of Silence: Proceedings of the Russell International War Crimes Tribunal* (1968); Luce & Sommer, *Viet Nam, The Unheard Voices* (Cornell, 1969) pp. 174-176, 266-268; Jonathan Schell, *The Village of Ben Sue* (Vintage 1967).

Then too, there is the cost to our nation, in dead, in wounded, in families and lives disrupted, sometimes irreparably, in the searing, psychic injury of a young boy, not of legal age, who is exposed to the brutalization of this vicious, immoral war, who perhaps is himself forced to become a killer—and that, not in the cause of liberty or some other high-minded cause he believes in, for no one asks him whether he likes it or not, but solely because the President, by fiat, decides that it is his pleasure (or displeasure, it amounts to the same) that the boy comply. There is the cost in money badly needed for our poor, for our cities, and the urgent need for anti-pollution programs to restore ecological balance. And there is the damage to the conscience of our nation, a nation born in revolution from tyranny, dedicated to individual freedom and happiness, which suddenly finds itself cast in the role of oppressor, of bully, without quite understanding how it all happened.

Of course, the acts described above violate the rules of warfare. *Charter of the International Military Tribunal at Nuremberg,* 59 Stat. 154-4 (1945), affirmed by unanimous resolution of the General Assembly of the United Nations, G.A. Res. 95(I), Dec. 11, 1946. Office of U.S. Chief of Counsel for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression,* Opinion and Judgment (1947); U.S. Dept. of the Army, *Trials of War Criminals Before the Nuremberg Military Tribunals under the Control Council Law No. 10* (1951); *Judgment of the International Military Tribunal for the Far East* (mimeographed), Nov. 1948. *Ex parte Quirin,* 317 U.S. 1, 27; *United States* v. *Pink,* 315 U.S. 203; *Cook* v. *United States,* 288 U.S. 102; cf. *In re Yamashita,* 327 U.S. 1. See also U.S. Dept. of the Army, *The Law of Land Warfare* (Field Manual No. 27-10, 1963).

If there is to be any hope of preserving law and order—without which only anarchy is possible, this Court must respond to the felt need and declare that this war, however well-intentioned its planners may have been, is an ill-conceived and unlawful war. We must return to the original concept that both houses of Congress must affirmatively authorize the transition from peace into war, and that the President is not empowered to act without such authorization—except to repel attacks against the mainland, for it remains as true today as it was 180 years ago that it should always be easier for this country to go to peace than to go to war.

III. If the Legality of the Vietnam War is Held to be a Political Question, the Indictment against the Appellee must be Dismissed.

Axiomatically, the Constitution delegates no power of any sort to wage an illegal war. This is equally true whether the illegality stems from the President's usurpation of the war powers by dispensing with the constitutional requirement that Congress "declare" war, or whether the illegality stems from the violation of binding treaties or of international laws of the rules of warfare.

For its part, the government must prove beyond a reasonable doubt every element of the offense, including proof that the induction order issued to the appellee was valid. And on his part, the appellee is entitled to his defense that the order was not valid, because the Vietnam war is illegal and therefore the Act lacks a constitutional foundation.

Consequently, if the legality of the Vietnam war is held to be a political question, appellee is deprived of his defense, and the indictment against him must be dismissed either on due process grounds or on the ground that the

court lacks jurisdiction of the offense. As Mr. Justice Murphy expressed the point in his concurring opinion in *Estep* v. *United States*, 327 U.S. 114, 131:

> "There is something basically wrong and unjust about a juridical system that sanctions the imprisonment of a man without ever according him the opportunity to claim that the charge made against him is illegal."

Mr. Justice Jackson, joined by Mr. Justice Frankfurter, further expounded the doctrine in his dissenting opinion in *United States* v. *Spector*, 343 U.S. 169, 177-178:

> "The Act does not permit the court which tries him for this crime to pass on . . . the correctness or validity of the order. . . . If Congress can subdivide a charge against an alien and avoid jury trial by submitting the vital and controversial part of it to administrative decision, it can do so in the prosecution of a citizen. And if vital elements of a crime can be established in the manner here attempted, the way would be open to effective subversion of what we have thought to be one of the most effective safeguards of all men's freedom."

Professor Henry M. Hart, Jr., commenting on the *Estep* decision, *supra*, reached the same conclusion, but articulated it in jurisdictional terms rather than in terms of due process:

> "Three Justices of the Supreme Court of the United States were willing to assume that Congress has power under Article I of the Constitution to direct courts created under Article III to employ the judicial power conferred by Article III to convict a man of a crime and send him to jail without his ever having had a

chance to make his defenses. No decision in 164 years of constitutional history, so far as I know, had ever before sanctioned such a thing. Certainly no such decision was cited."

Hart, the Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectics, 66 Harv. L. Rev. 1362, 1382 (1953).

It follows that, if the issue of legality of the Vietnam war—as it bears on the power of Congress to conscript the appellee—is held to be a political question, the indictment against the appellee must be dismissed. Whether the dismissal is viewed as a matter of the jurisdiction of Article III courts or as a matter of due process under the Fifth Amendment depends on whether the political question doctrine is jurisdictional or discretionary, a question of academic interest, but one which would not affect the result herein.

The only basis for avoiding the necessity of dismissing the indictment would be to hold that, while the appellee has been deprived of the defense based on the illegality of the war, he will not have been harmed if he is acquitted on the ground that he "reasonably believed" the war to be illegal, a belief which negates the existence of specific intent. Such a constitutionally required defense, or rather such a constitutionally imposed "specific intent" element as part of the offense charged under the Act, would in fact result in the acquittal of the appellee: the district court found that the appellee was sincere and that his belief that the war is illegal, without necessarily being right, was reasonable (A. 252). Cf. Packer, Mens Rea and the Supreme Court; Article 6(a) and Article 8 of the Treaty of London, August 8, 1945, 59 Stat. 1544, which impose "individual responsibility" for determining the legality of a war.

IV. The District Court Correctly Held that, as Applied to the Appellee, the Act Violates the Religion Clauses of the First Amendment and the Due Process Clauses of the Fifth Amendment.

Introduction.

Appellee's prior argument herein has been that Congress has no power to draft him now, not because he is a conscientious objector, but because Congress has no power to draft now. By way of preface to the remaining argument based on the First and Fifth Amendments, the following points need to be emphasized so that they will not be obscured.

First, the government squarely bases the validity of the induction order issued to the appellee on ". . . the constitutional grant of power to Congress to raise and maintain armies (Art. I, Sec. 8). . . ." (Brief, p. 40).

Second, the government asserts that the power is absolute, and hence not subject to qualification by weighing it in a balance with individual rights. The only qualification conceded by the government as to the absolute character of the power is that if Congress chooses to exercise only a part of the power, as by legislative grace exempting religious pacifists, invidious distinctions may not be created. Thus, in the government's view, no problem of constitutional dimensions would be presented if Congress simply eliminated the exemption for religious pacifists.

By contrast appellee maintains that the Constitution delegates to Congress a limited, not an absolute, power of conscription—and then only by inference that the power is sometimes "necessary and proper" in responding to national emergencies. However, the other side of the coin, so to speak, is that conscientious objectors are constitutionally exempted from military service at the present time

under the First, or the Ninth, Amendment. The government denies the existence of this constitutional right of conscience by noting that language expressly protecting conscience was initially proposed and subsequently deleted from the bill of right (Brief, p. 46, n. 14). By the same logic, the government presumably would conclude that the doctrine of separation of powers was likewise rejected by the framers of the Constitution since the doctrine was considered but never formally adopted.[1]

But even a casual examination of the history of the drafting of the First Amendment reveals that in all probability the phrase "rights of conscience" was deleted as superfluous. The phrase was adopted by the House of Representatives on August 20, 1789:

> "Art. III. Congress shall make no law establishing religion or prohibiting the free exercise thereof; nor shall the rights of conscience be infringed."[2]

On June 8, 1789, Madison had proposed the amendment in this form:

> "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."[3]

Commenting on the entire bill of rights as he had proposed it, Madison stated:

> "Although I know whenever *the great rights*, the trial by jury, freedom of the press, or *liberty of conscience*,

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[1] Farrand, The Records of the Federal Convention of 1787 (1911), pp. 56, 66, 77, 138, 152, 163, 177, 537.

[2] Patterson, The Forgotten Ninth Amendment (1955), p. 86.

[3] *Id.*, p. 110.

come in question in that body, the invasion of them is resisted by able advocates, yet their Magna Charta does not contain any one provision for the security of those rights, respecting which the people of America are most alarmed. The freedom of the press and *rights of conscience,* those choicest privileges of the people, are unguarded in the British constitution."[4] (Emphasis added.)

It is noteworthy that Madison singles out liberty of conscience as one of the "great rights."

On August 15, 1789, the clause had been amended to read as follows:

"No religion shall be established by law nor shall the equal rights of conscience be infringed."[5]

Commenting on this clause, Madison said he understood it to mean that:

"Congress should not establish a religion, and enforce a legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."[6]

However, the clearest expression that the word "religion" as used in the Constitution encompasses freedom of conscience appears from the "declarations of rights" which preface the ratification of the Constitution by the states of New York, North Carolina, Rhode Island and Virginia. Thus, on July 26, 1788, New York ratified the Constitution.

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[4] *Id.,* pp. 112-113.

[5] *Id.,* p. 160.

[6] *Id.,* p. 161.

"Under these impressions and declaring that the rights aforesaid cannot be abridged or violated and that the Explanations aforesaid are consistent with the said Constitution."[7]

Among the rights declared to be inviolable as well as consistent with the Constitution was the following:

"That the People have an equal, natural and unalienable right, freely and peaceably to *Exercise their Religion according to the dictates of conscience,* and that no Religious Sect or Society ought to be favoured or established by Law in preference of others."[8] (Emphasis added.)

Rhode Island likewise declared the existence of certain inalienable rights, "of which men when they form a social compact, cannot deprive or divest their posterity,"[9] and declared that the Constitution was being ratified by Rhode Island with the understanding that nothing in the Constitution could be interpreted as an attempt by Rhode Island, by social compact, "to divest posterity of these inalienable rights."[10] Among the inviolable rights declared by Rhode Island is:

"4th. That *religion,* or the duty which we owe to our Creator, and the manner of discharging it, *can be directed only by reason and conviction,* and not by force or violence, and therefore all men, have an equal,

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[7] Hunt & Scott, *The Debates and the Federal Convention of 1787 Which Framed the Constitution of the United States of America,* reported by James Madison (New York, 1920).

[8] *Id.,* p. 666.

[9] *Id.,* p. 681.

[10] *Id.,* p. 683.

natural and inalienable right to the free exercise of religion according to the dictates of conscience, and that no particular religious sect or society ought to be favored, or established by law in preference to others." [11] (Emphasis added.)

North Carolina and Virginia declared the existence of the same inalienable right consistent with the Constitution in language virtually identical to that employed by Rhode Island.[12] All define free exercise of religion as meaning "free exercise of religion according to the dictates of conscience," and all declare that "religion . . . can be directed only by reason and conviction."

Clearly, the "rights of conscience" declared and recognized repeatedly when the Constitution was ratified and the Bill of Rights adopted, permit no doubt that such rights either are included in the religion clauses of the First Amendment, or—since they are inalienable—are recognized by the Ninth Amendment declaration that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Of course, appellee does not assert a general right of unlimited scope to follow the dictates of his conscience, see, *e.g., McGowan* v. *Maryland,* 366 U.S. 420, 437, 440, but rather he asserts a limited right of conscience in the context of objection to war. Chief Justice Stone was clearly correct in admonishing: ". . . both morals and sound policy require that the state not violate the conscience of the individual. All our history gives confirmation to [this] view . . ." and

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[11] *Id.,* p. 681.

[12] *Id.,* pp. 676, 662, respectively.

> ". . . there . . . is a very radical distinction between compelling a citizen to refrain from acts which he regards as moral but which . . . the law regard[s] immoral . . . and compelling him to do affirmative acts which he regards as unconscientious and immoral."

The Conscientious Objector, 21 Columbia University Quarterly, No. 4, October 1919, pp. 268-269. It follows that the right to be a conscientious objector is one of those rights recently described as "fundamental" with deep roots in the "traditions and [collective] conscience of our people," and protected by the Ninth Amendment. *Griswold* v. *Connecticut*, 381 U.S. 479, 493 (concurring opinion of Mr. Justice Goldberg joined by the former Chief Justice and by Mr. Justice Brennan).[13]

The Non Establishment Clause.

The court below developed at length the reasons why the statute as applied to appellee would violate the free exercise clause of the First Amendment even in the absence of exemption, presently included in the statute, in favor of those conscientiously opposed to war in any form.[14] Because of the degree of attention given this point in the opinion of the District Court, which appellee substantially adopts as his argument before this Court, it seems appropriate to devote this section of appellee's brief primarily

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[13] This case, unlike *Griswold* v. *Connecticut*, *supra*, of course does not involve the problem of "incorporation" of the Ninth Amendment in the Fourteenth; only federal action is here questioned.

[14] After the government filed its brief herein, the District Court for the Northern District of California, on December 24, 1969, acquitted a religious selective objector in *United States* v. *Bowen*, Cr. No. 42,499. Hence the statement in the government's brief, p. 48, that no court other than the district court below has recognized selective objection, is no longer accurate.

to the question of unconstitutional discrimination. In view of the nature of appellee's belief and the denial to him of an exemption granted to others whose cases cannot be constitutionally distinguished, to punish appellee for refusal to submit to induction would constitute a preference of one sort of religious belief over another in violation of the First Amendment.

It is important to dispel certain misconceptions created by the government's brief as to the character of the issues to be decided and the situations that must be considered in order to reach a sound decision in the present case.

In the first place, it is not correct, as the government's brief implies, that appellee's case can be considered only in relation to the case of the formally religious objector to all wars who is clearly exempt under the statute. Specifically, the government's brief states that it is not necessary to consider in the present case what disposition is to be made of the case of the objector to all wars whose belief is not formally religious but has ethical roots akin to those of appellee (Brief, pp. 51-52). *Welsh* v. *United States,* No. 76, 1969 Term. Furthermore, the government does not take adequate account of the relation between the appellee's case and that of an objector who, like appellee, is not necessarily opposed to all wars, but whose opposition to the Vietnam war is grounded in religion in the formal sense. *United States* v. *Bowen,* Cr. No. 42499 (N.D. Calif. Dec. 24, 1969). In order to avoid an unconstitutional difference in treatment, it is necessary to reconcile the disposition of the present case with the disposition to be made of these other cases arising under the same statute and involving the same or very similar constitutional considerations.

The government appears to take the position that any claim of discrimination in the present case arises solely under the due process clause of the Fifth Amendment and

not under the religion clauses of the First Amendment. Specifically, it suggests that this is the only basis for appellee's complaint in regard to difference in treatment between those opposed to war in any form and those who are not necessarily opposed to every war (Brief, 11, 43, 47, n. 15, 51). The inadequacy of this approach, an approach that results in obscuring appellee's rights under the First Amendment, becomes clear from an examination of appellee's position in relation to other types of conscientious objectors.

Consider first the position of the clearly religious, although selective, objector. Under the statute he is not exempt. Only those opposed to all war are exempt. The government's argument is that the sole question presented for consideration in such a case is whether the distinction between general and selective is so arbitrary and irrational as to violate the due process clause and that there is no question of discriminatory treatment of different religious beliefs in violation of the First Amendment. This view might make sense if the statute exempted all general objectors, while not exempting any selective objectors. But that is not what the statute does. It does not exempt all general objectors. It exempts only those whose objection is based upon religious belief. The statute exempts those "who, by reason of religious training and belief, [are] conscientiously opposed to participation in war in any form." 50 U.S.C. App. 456 (j). The general objector whose objection is based upon political, sociological or economic considerations, for example, is not exempt. It is clear that what Congress believes worthy of exemption is objection that is both general *and* religious, objection in which these two elements are so related that the generality of the objection derives from the religious character of the belief. It is this obvious fact about legislative intent and statutory structure that gives rise to a question of in-

validity under the establishment and free exercise clauses of the First Amendment.

To make this important point clear, the claim of the orthodox religious selective objector that he cannot be convicted under the statute as it is presently drawn arises under both the due process clause of the Fifth Amendment and the religion clauses of the First Amendment. Insofar as the distinction between general and selective can find no basis in reason, which we believe to be the case, it violates the due process clause. This same arbitrariness constitutes a violation of the establishment and free exercise clauses, because of the manner in which religion and opposition to war in any form are conjoined in the statute. The First Amendment claim in fact has a different, more urgent quality than that arising solely under the due process clause. A distinction made between religious beliefs, such as is made by the statute between the general religious objector and the selective religious objector, requires more cogent reasons for its justification than a distinction made on some ground other than religion. This is because, as this Court has said, one of the principal purposes of the First Amendment was to prevent discrimination among religious beliefs and to prevent the preference of one religion over another. *Everson* v. *Board of Education of the Township of Ewing,* 330 U.S. 1, 15 (1946).

Consider next the case of the person who objects to all war, but whose objection rests upon ethical beliefs similar to those of appellee, rather than upon formal religion. Unless one takes the position that promoting one religious belief over another, or promoting a formal religion over more personally conceived creeds is a policy devoid of rationality—a proposition that would brand as irrational the policy of many governments down through the centuries—this person's claim rests exclusively upon the religion clauses of the First Amendment and the constitutional pro-

hibition against preferring one religious belief over another. The case here supposed is the constitutional equivalent of *United States* v. *Seeger*, 380 U.S. 163.

Finally, what is the nature of the appellee's claim in the present case? He is a selective objector. Although he is conscientiously opposed to the Vietnam war, he is not prepared to say *a priori* that all uses of military force in all circumstances is morally wrong—a position one can hardly describe as unreasonable for a morally concerned man. Although the basis of appellee's objection is not formal religion, it is certainly conscientious, and the court below spoke of it as founded upon "the deepest convictions and ethical commitments, apart from formal religion, of which a man is capable" (A. 249). Appellee's claim to be treated on an equal footing with the selective objector whose position is based on religion in the formal sense, rests upon the religion clauses of the First Amendment and the policy against preferment of particular religious beliefs. Along with the formally religious selective objector, however, his claim to be treated on an equal footing with the general religious objector rests on both the due process clause of the Fifth Amendment and the religion clauses of the First. To deny the appellee exemption when it is granted to the general religious objector is both arbitrary and irrational and a preferment of one religious belief in the constitutional sense over another.

In support of its view that the statute does not impose an impermissible discrimination among religious beliefs in its failure to exempt objectors to particular wars, the government argues that such objection is political or sociological and cannot be religious. This notion is simply not supported by an examination of the beliefs and traditions of many sincerely religious individuals and groups.[15] That

[15] See the District Court's reference to the teachings of Thomas Aquinas and Pope John XXIII (A. 262).

objection is to particular wars rather than all wars does not necessarily mean that the objection is not rooted in values and beliefs as ultimate as any that support objection to war in all circumstances. As the court below pointed out, "[A] selective conscientious objector might reflect a more discriminating study of the problems, a more sensitive conscience, and a deeper spiritual understanding" (A. 258).

That some element of reasoning and reflection upon the data of experience and contemporary events enters into the formation of judgment that a particular war is wrong does not deprive that judgment of its moral and religious quality, of a foundation in ultimate values. The notion that a process of reasoning and self-education is inconsistent with religion was laid to rest in the *Seeger* case where the defendant reached his conscientious position by just such a process. There is neither more nor less reasoning necessarily involved in reaching the conclusion that all war violates ultimate values than there is in reaching the conclusion that a particular war does.

Likewise, an objection is not deprived of its religious foundation because it is of a relatively limited scope and reflects a discriminating moral judgment because it condemns a particular military action rather than engaging in wholesale condemnation. No one would maintain that a man's refusal to kill a particular person under certain circumstances was not religiously motivated because it was not accompanied by a declaration that it is wrong ever to kill anyone under any circumstances, nor that an objection to the use of the hydrogen bomb on the civilian populations of large cities is not religiously grounded because not accompanied by a declaration that it is also wrong to

use any weapons in any circumstances.[16] In fact, those who are exempt under the statute because they are religiously opposed to participation in "war in any form," are permitted to make moral distinctions without forfeiting their exemption. Thus they need not be opposed to the use of domestic police, nor to the use of force in self-defense.[17] If these distinctions do not destroy the religious quality of objection, it is hard to see why a distinction drawn among wars themselves should do so.

Are there any nonreligious purposes served by the distinction between general and selective objection which the government is entitled to pursue, even if doing so occasions incidental preference of particular religious beliefs? Such considerations must be especially cogent and impressive, and incapable of being satisfied in another manner, to justify the effect of promoting one religion over others. The truth of the matter is that neither the government in its brief nor the commentators who have addressed them-

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[16] "With these truths in mind, this most holy synod makes its own the condemnations of total war already pronounced by recent popes, and issues the following declaration: Any act of war aimed indiscriminately at the destruction of entire cities of extensive areas along with their population is a crime against God and man himself. It merits unequivocal and unhesitating condemnation." Pastoral Constitution on the Church in the Modern World, Second Vatican Council, Pt. II, chapter V, sect. 1.

[17] In *Sicurella* v. *United States*, 348 U.S. 385, the Court took it as conceded by the government that a person could be in favor of self-defense, defense of family, and associates and still be entitled to exemption. The question presented by the case was whether a readiness to fight in defense of brethren, Kingdom Interests and ministry, and to engage in wars commanded by Jehovah, deprived a person of exemption on the ground that he was not opposed to "participation in war in any form," and the Court held that it did not. The majority of the Court and Mr. Justice Minton, dissenting, disagree in their interpretation of the record as to whether the petitioner was willing to use "carnal weapons" for these purposes.

selves to this matter[18] have come up with anything that even begins to justify a difference in treatment.

One consideration that has been suggested is that it is more difficult to determine the sincerity of selective objectors, but the court below would seem to have given an irrefutable answer to this suggestion (A. 259-260).

The government in its brief can only say that Congress denied exemption to selective objectors "for understandable reasons" (Brief, p. 46, n. 14), and that it is "self-evident" that there is a rational basis for the distinction (p. 47). However, when one seeks to learn why it is self-evident and what are the "understandable reasons," the government's brief gives little help. The judgment of a selective objector is said to be "political," "personal" and "immediate," these qualities supposedly distinguishing it from that of the general objector (p. 47). As has already been pointed out, it is not possible to maintain that opposition to a particular war is necessarily any more political or less religious than opposition to all wars. As the court below noted, if by saying that opposition to particular wars is political the government means simply that such opposition involves a judgment as to the conduct of the state, then "any decision as to any war is not without some political aspect" (A. 252). So far as the "personal" quality of a judgment is concerned, the *Seeger* case made it clear that a personal judgment can be as religious as an institutionally supported judgment or a judgment resting upon authority. Furthermore, what could be the relation between the "personal" nature of the judgment and a secular purpose that Congress is entitled to pursue? And as for the selective objection being "immediate," this does

[18] Potter, Conscientious Objection to Particular Wars, Religion and the Public Order 44 (1968) Finn, E. D., A Conflict of Loyalties: The Case for Selective Conscientious Objection (1968); Clark, Guidelines for the Free Exercise Clause, 83 Harv. L. Rev. 347 (1969).

not seem to refer to the objection being formed hastily, but rather, once again, to the limited character of the objection in that it does not involve a blanket condemnation of all wars. In other words, it is simply to restate that the objection is selective, not to give any explanation of why this fact is significant in terms of a secular purpose that Congress is entitled to pursue notwithstanding the creation of a preference of religion.[19]

When one seeks an explanation for the *feeling* that selective objectors are different from traditional pacifists and ought to be treated differently, it seems to come down to this. The selective objector creates more discomfort and anger than the pacifist. The pacifist when asked why he is opposed to the Vietnam war says that he is opposed to all war, not especially to the Vietnam war, and that he would be opposed to a war no matter how justified it seemed to the man of average moral sensibilities, even a war of pure defense. The character of this response enables the hearer to escape feeling personally and directly challenged on moral grounds because the position taken by the pacifist is entirely beyond the range of moral standards to which he is accustomed and by which he attempts to judge himself. With the selective objector, however, the situation is quite otherwise. When asked why he is opposed to the Vietnam war, he does not produce a sweeping general objection wholly outside the range of familiar moral discourse. Instead he produces reasons specifically applicable to the situation at hand and engages in argument of a sort that the hearer recognizes as having something to do with himself as a moral man. The selective objector concedes

[19] In n. 16 on p. 49 of its Brief, the government states the substance of the views of the majority of the Marshall Commission on the subject of selective objection. The cogent opinion of the minority of that Commission effectively demonstrates the murkiness and inadequacy of the majority's reasoning.

that there may be situations in which the use of military force is justified; he agrees in many things, but disagrees about the situation at hand. It is the difference between telling a businessman that all business is a fraud and telling him that a particular business practice in which he is engaged is dishonest. The specificity of the indictment explains the strength of the businessman's emotional response.

But an explanation of a feeling about selective objection hardly amounts to a reason upon which to found punitive governmental action or to justify a discrimination among religious beliefs. What remains is simply a preference of certain religious beliefs over others, a preference condemned in *Everson* v. *Board of Education,* 330 U.S. 1, 15 (1946). The influence of government, in the words of the Court's opinion in *Torcaso* v. *Watkins,* is being "put on the side of one particular sort of believers," 367 U.S. 488, 490, and against the free development of moral and religious ideas about the morality of war. The First Amendment was clearly designed to prohibit government from aligning itself in this fashion with any religious tradition. It is the diversity and free development of religious ideas, spoken of in *Seeger,* that is at stake.

In *Seeger* the question was whether the statute contained a preference for traditional theistic beliefs. Here the question is whether the statute contains a preference for religious beliefs that lead to a wholesale condemnation of war over religious beliefs that lead to more discriminating moral judgments.

The foregoing arguments concerning discrimination have been made on the assumption that the selective objector is clearly religious. Such a selective objector must be exempt if exemption is given general religious objectors, in order to avoid an impermissible preference of religion. Appellee's position is that the character of his objection entitles

him to exemption as well if the formally religious selective objector is exempt.

Whatever the possibly narrow meaning of "religious training and belief" may be under the 1967 version of section 6(j),[20] from the beginning appellee has contended that the character of his belief entitles him to protection under the First Amendment. The government's repeated characterization of appellee as nonreligious should not obscure what appears from the opinion of the court below. The court stated that the beliefs of persons like appellee, although they may not rest upon formal religion, do rest upon "the deepest convictions and ethical commitments, apart from formal religion, of which a man is capable" (A. 249). In another place, the court referred to "men, like Sisson, who whether they be religious or not, are motivated in their objection to the draft by profound moral beliefs which constitute the central convictions of their beings" (A. 263). The court also stated that "Sisson's table of ultimate values is moral and ethical. It reflects quite as real, pervasive, durable, and commendable a marshalling of priorities as a formal religion. . . . what another derives from the discipline of a church, Sisson derives from the discipline of conscience" (A. 252). These findings as to the nature of appellee's belief could as well characterize the beliefs of the defendant in the *Seeger* case and, as the opinion in the *Seeger* case suggested, commitments of this nature fall within the broadened notions of

[20] The Director of the Selective Service System, Gen. Hershey, whose function it is to administer the process of selection of manpower for the armed forces, is persuaded that in amending section 6(j) in 1967, Congress intended to narrow the scope of the statutory concept of "religion" so as to revert to the pre-*Seeger* administrative definition. Legal Aspects of Selective Service, Gov. Print. Off. (January 1, 1969), pp. 13-14.

religion that characterize modern thought.[21] In *Torcaso* v. *Watkins*, the Court made it clear that the protection of the First Amendment is not restricted to traditional religions based upon a belief in the existence of God, but includes many other religions, such as Ethical Culture and Secular Humanism. 367 U.S. 488, 495, n. 11.

It is important to lay to rest the unwarranted fears that the government's brief stirs as to the implications of an affirmance in this case. The parade of horribles suggested is hardly justified. The government's brief states that an affirmance "would of necessity extend beyond the Selective Service context and reach all matters as to which an individual claimed to be conscientiously opposed . . .," and that this would be "wholly destructive of the orderly functioning of government and would undermine the essential integrity of the democratic process" (pp. 46-47). In another place the government mentions conscientious objection to open housing legislation and states that if selective objection to war is allowed, "there is no logical stopping place insofar as persons who oppose other governmental policies are concerned" (pp. 48-49).

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[21] In the course of construing the phrase "religious training and belief" in section 6(j), this Court in *Seeger* spoke of the "richness and variety of spiritual life in our country." 380 U.S. at 174. Among the types of believers mentioned are those who "think of religion as a way of life envisioning as its ultimate goal the day when all men can live together in perfect understanding and peace." *Ibid.* The Court also spoke of "the ever-broadening understanding of the modern religious community." *Id.* at 180, and "the diverse manners in which beliefs, equally paramount in the lives of their possessors, may be articulated." *Id.* at 183. The Court by way of further illustration of the variety of religious beliefs, quoted from Dr. David Mussey, leader in Ethical Culture Movement, a passage very similar to the lower court's characterization of defendant's belief in the present case: "Religion, for all the various definitions that have been given of it, must surely mean the devotion of man to the highest ideal that he can conceive." *Ibid.*

These fearful statements wholly ignore the magnitude of the interest that a man has in not killing in violation of his conscience and the interest of the community in respecting his conscientious predicament. Throughout its history the nation has recognized the special urgency of a claim to be relieved from killing in violation of conscience. The fact that our conscription legislation has always included provision for conscientious objectors, although exemption was not provided from other legal obligations, evidences a deep community awareness of a uniquely serious problem.

The court below reached the conclusion that "the magnitude of Sisson's interest in not killing in the Vietnam conflict as against the want of magnitude in the country's present need for him to be so employed" (A. 261) prohibited the application of the Act to him to require combat service in Vietnam. It is important to observe that this judgment as to the relative magnitude of an interest protected by the First Amendment and the country's need for appellee to perform combat service in Vietnam is not principally relevant to the claim of impermissible discrimination in violation of the First and Fifth Amendments. It is principally relevant to the court's alternative holding that appellee could not be convicted even if there were no conscientious objector exemption in the statute. So far as the discrimination claim is concerned, no matter how pressing the country's need for troops, it is not constitutionally proper to meet that need by a conscription act that discriminates between different types of belief according to whether they are of the traditional theistic variety or of the sort embraced by the defendant in the *Seeger* case and the appellee in the present case, or according to whether they involve objection to all wars or only to some wars.

The Free Exercise Clause.

In regard to the District Court's alternative ground for decision, it is not correct to say, as the government does, that the court has overridden a legislative and executive determination of a need for combat troops in Vietnam. The government states that, "It is not the province of courts to decide . . . whether there is or is not any need for specified numbers of men in a particular place at a certain time," and that "the court below has substituted its opinion for that of the legislative and executive branches as to what constitutes national need" (pp. 40, 41). There is no dispute as to the limited nature of the government's need for combat troops in Vietnam. As the court below observed, there is no "suggestion that in present circumstances there is a national need for combat service from Sisson. . . ." (A. 258.) "'The last extremity' or anything close to that dire predicament" has not been "glimpsed, or even predicted, or reasonably feared" (A. 261). Action of the legislative and executive branches themselves, not any finding by the court below on the basis of conflicting evidence, establish the limited character of the need for troops in Vietnam. The variety of exemptions in the Act, including the exemption of certain types of conscientious objectors, supplemented by what is common knowledge, establishes the limited character of the need for combat troops. If further argument is needed, it is provided by the recent adoption of a lottery system to determine who shall serve in the Armed Forces when only a fraction of available manpower is needed.

The court below did not find the limited nature of the government's need for combat troops in Vietnam in the face of some dispute about that fact or in disregard of legislative or executive findings. Rather, on the basis of unquestioned facts, it assessed their constitutional significance, a function wholly appropriate to a court charged

with the duty to protect values embodied in the Bill of Rights. The court properly held that, given the limited need for combat troops in Vietnam, the constitutional protection guaranteed in the free exercise clause requires that the government accommodate its conscription methods to take account of the conscientious scruples of persons in appellee's position. Considering the magnitude of the appellee's interest and the interest of society in not compelling persons to choose between jail and their deepest beliefs in so grave a matter as the taking of human life, this hardly seems an exaggerated reading of the free exercise clause. This is especially true considering the demonstrated ability of the nation to carry on far greater conflicts, such as World War II, while at the same time granting numerous exemptions, some on grounds much less impressive than conscientious objection.[22]

To the extent that the magnitude of the governmental interest is considered and weighed against the appellee's interest and the nation's interest in regard to conscientious objection, it is difficult to see how the district court's conclusion can be avoided if the free exercise clause is to be given any meaning. Otherwise the assertion of any governmental interest would of itself make inapplicable the free exercise clause. To accept the government's argument on this point (p. 42) would place the religious liberty guarantee in the Bill of Rights entirely at the mercy of legislative action, no matter how extreme. But the Bill of Rights was intended to declare limits upon the scope of legislative power. On other occasions this Court has considered the magnitude of governmental interests and

[22] That a threat to military effectiveness does not result from granting exemption to conscientious objectors, even in what must be characterized as "the last extremity" is demonstrated by the fact that England granted exemption to all conscientious objectors, including selective objectors, during World War II.

found them insufficient to justify a burden on the free exercise of religion. See, *e.g., Sherbert* v. *Verner,* 374 U.S. 398 (1963); cf. *In re Jenison,* 375 U.S. 14 (1963), on remand, 267 Minn. 136, 125 N.W. 2d 588 (1964).

It was precisely the fear of arguments for the expediency of unbridled legislative and executive power which prompted the adoption of the Bill of Rights: the first eight amendments in terms limit the power of the federal government, the ninth declares that the first eight amendments do not exhaust the list of inalienable individual rights, while the tenth reemphasizes the fundamental principle that ours is a government of limited powers, so that powers not delegated are retained by the states and the people. The First Amendment is directed squarely at "Congress."

The government's refusal to admit the necessity of accommodating Congress's claim of power to raise armies by conscription with the individual's claim to freedom of conscience is a refusal to acknowledge the importance of individual liberty in our system of democratic institutions. The price the government is willing to pay in the name of national defense is the elimination of the *right* to individual liberty, as opposed to a qualified "privilege" to liberty granted by legislative grace. Congress has no power under the Constitution to exact appellee's liberty in order to pay that price. For the Court of Appeals for the Second Circuit was surely correct when it observed,

> ". . . the principal distinction between the free world and the Marxist nations is traceable to democracy's concern for the rights of the individual citizen, as opposed to the collective mass of society. And this dedication to the freedom of the individual, of which our Bill of Rights is the most eloquent expression, is in large measure the result of the nation's religious heritage."

United States v. *Seeger*, 326 F. 2d 846, 854-855, aff'd 380 U.S. 163. To permit the government to take appellee's liberty would be to eliminate the most fundamental difference between the concept of society embodied in the Constitution and the concept of totalitarian society.

Conclusion.

Ultimately, what is at stake in this case is the viability of our present institutions. In its zeal to defend the Nation, the government is systematically destroying the values and institutions which make the Nation worth preserving. And in accumulating its vast powers, the government is rendering itself obsolete, a dinosaur whose certain fate is extinction.

This Court should exert all of its authority to halt the escalation of governmental power and restore the traditional values which once characterized our society—life, liberty, the pursuit of happiness. It may be difficult to always achieve the proper balance between governmental power and individual rights, to strike the "golden mean," but viewed in perspective, this case is not hard to decide. The appellee respectfully submits that the judgment of the district court should be affirmed.

JOHN G. S. FLYM.

On the brief,

FLYM, ZALKIND & SILVERGLATE.